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**A HAND-BOOK**  
**OF THE**  
**LAW OF SCOTLAND.**

**BY**  
**JAMES LORIMER, ADVOCATE, M.A., F.R.S.E.,**  
PROFESSOR OF PUBLIC LAW IN THE UNIVERSITY OF EDINBURGH.

*"Potius ignorantia juris litigiosa est, quam scientia."*  
—CICERO, De Leg. I., c. 6.

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## PREFACE TO THE SECOND EDITION.

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THE favour with which the first edition of this little work was received, has induced both the Author and the Publisher to make considerable efforts to render the second more worthy of public acceptance.

Not only has the text been carefully revised, and modified in accordance with such changes as subsequent legislation has introduced into the law, but new matter has been added, wherever it appeared that subjects of importance or of general interest had been overlooked. An attempt has also been made to render the book more useful to students, and more interesting to intelligent readers of all classes, by indicating with greater fulness than had been done in the former edition, the sources from which the law of Scotland has derived those characteristics in which it differs from that of England. The historical account of the office of Sheriff, the article on the Court of the Lord Lyon, that on Litigation by the Poor, and other portions of the work as it now stands, are entirely new.

The book having been originally intended for non-professional readers, who could not be supposed to possess professional libraries, no references to authorities were given. But, probably from its being the most recent work on many branches of our law, it appears that its pages were turned over by lawyers more frequently than its Author had contemplated, and by them the absence of references was severely felt. The Publisher determined that this defect should be supplied; and as the other avocations of the Author did not admit of his undertaking this task, he counted himself fortunate in securing the aid of his friend, Mr James Barclay. He has every reason to believe that Mr Barclay has executed this portion of the work with such care and fidelity as to merit the confidence of the public, and to call for his warmest thanks. A similar expression of gratitude is due to Mr Barclay's father, Mr Sheriff Barclay, for many valuable suggestions during the progress of the work, and to the Author's old and dear friend, Mr Sheriff Hallard.

## PREFACE TO THE FIRST EDITION.

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WHEN a popular book on a professional subject is presented to the public by a professional man, it is usual for him to preface it with an apology for its existence ; and were his object either to diminish the scientific exactitude of professional study, or to open the practice of a profession to those who have received no special training, there would be reason for an apology, if indeed any apology could avail. But the case, I trust, is very different where all that has been attempted, as regards practice, has been to furnish the means of encountering, with confidence and serenity, those occurrences in which the non-professional person *must* act without professional aid ; and as regards study, to afford a general view of the subject, and a guide to more recondite sources of information. These are the objects which I have endeavoured to keep exclusively in view in the preparation of this work ; and I therefore believe, with some confidence, that whatever may be its other defects, it will not be found to have overstepped the legitimate province of the class of works to which it belongs.

In a book intended for practical application in emergencies, the first requisite is, that the rules enunciated shall be safe; and this I have endeavoured to insure by drawing only from acknowledged sources. To have enumerated my authorities in every instance, would have been needlessly to encumber the pages of a popular treatise. Who they are, and where their dicta are to be found, my professional brethren will discover without difficulty, and the non-professional reader will not care to know. It may be proper, however, to state, that wherever I have adopted the opinion of an individual, however eminent, I have mentioned him by name; and where I am silent as to authority, the reader may assume, either that the doctrine as stated has been formally affirmed by a decision, or that it is recognised as trite law by text-writers of unquestionable reputation. The second requisite in such a work is, that the doctrines shall be stated with such precision and brevity as to exclude the possibility of misapprehension. Of the success with which the requirement of precision has been satisfied I can express no opinion; but, as regards brevity, I may mention, that in an undertaking of which the sole object was utility, and in which originality would have been a fault, I have endeavoured to earn such credit as it might yield by condensing, on almost every occasion, even where I have not otherwise altered, the expressions of former writers.

In addition to the two classes of persons whose requirements I have had primarily in view,—viz., the general non-professional

public on the one hand, and students on the other,—there is a third to whom I hope this little work may not prove unacceptable,—I mean strangers and foreigners who visit Scotland, and Scotchmen whom long or early absence from the country may have prevented from acquiring the knowledge of our legal arrangements usually possessed by intelligent persons. With a view to their service I have been careful to point out, in so far as the nature of the work permitted, in what respects the law of Scotland differs from that of England, and resembles the systems of Continental Europe, from which, up to the period of the Union, and indeed for half a century later, it was mainly derived.

Though exclusively popular in character, it is hoped that in one respect the work may not be without utility even to lawyers, the very extensive changes in the Law of Scotland of late years having rendered a Treatise, embracing the whole subject and bringing down the Law to the latest date, a desideratum in professional literature.

The only novelty in form which the book presents, so far as I am aware, consists in the division which I have adopted; which, though suggested by, does not correspond to, that of the Institutes of Justinian, and is wholly different from that of our own text-writers. That the distribution of our whole legal rights and obligations into those which, arising from the family tie, exist between parents and children of the same house, and into those which, springing from the human or citizen relation,

subsist between those who are merely brother men, possesses the charm of simplicity at least, will not be contested. To what extent it is inferior to more complicated arrangements, either in philosophical accuracy or practical usefulness, it is for others to determine.

Before concluding, I must avail myself of this opportunity to express my very sincere thanks to those friends who have lent me their encouragement and their aid. To Mr Fraser, Advocate, I am indebted not only for originally suggesting the undertaking, but for much valuable advice and assistance during its prosecution; and Mr Sheriff Hallard, and Mr J. R. Stodart, W.S., by giving me the benefit of their knowledge and experience, the one as a Magistrate and the other as an Agent and Practical Conveyancer, have enabled me to present it to the public, if not with confidence, at least with far less hesitation than I should otherwise have felt.

ADVOCATES' LIBRARY, *July* 1859.



# CONTENTS.

---

	Page
INTRODUCTION.—OF THE LAW OF SCOTLAND, . . . .	1

---

## BOOK I.

OF THE FAMILY RELATIONS, . . . . .	4
------------------------------------	---

### CHAPTER I.

<i>Of Husband and Wife, . . . . .</i>	4
I. Constitution of Marriage, . . . . .	4
II. Regular Marriage, . . . . .	7
III. Irregular and Clandestine Marriage, . . . . .	9
IV. Impediments to Marriage, . . . . .	11
V. Effects of Marriage on the Personal Status and Property of the Spouses, . . . . .	12
VI. How the Husband ceases to be liable for the Wife's Debts, . . . . .	22
VII. Community of Goods, . . . . .	25
VIII. How the Husband's power is excluded, . . . . .	27
IX. Separation—Judicial and Voluntary, . . . . .	30

	Page
X. Donations between Husband and Wife, . . . . .	35
XI. Dissolution of Marriage, . . . . .	37
XII. Effects of Divorce, . . . . .	49
XIII. Declarator of Nullity of Marriage, . . . . .	51
XIV. Consistorial Actions, . . . . .	51
XV. Marriage Contracts, . . . . .	52

## CHAPTER II.

<i>Of Parent and Child</i> , . . . . .	55
I. Legitimacy, . . . . .	55
II. The Paternal Power, . . . . .	59
III. Duty of the Father to aliment the Child, . . . . .	60

## CHAPTER III.

<i>Of Guardianship</i> , . . . . .	66
I. Tutory, . . . . .	68
II. Curatory, . . . . .	80
III. Pro-Tutors and Pro-Curators, . . . . .	87
IV. Factors <i>loco tutoris</i> , and Curators <i>bonis</i> , . . . . .	88
V. Cautioners for Guardians, . . . . .	92
VI. Guardianship of Insane and Facile Persons, . . . . .	93
VII. Curators <i>bonis</i> to the Insane appointed by the Court of Session, . . . . .	95
VIII. Interdiction, . . . . .	97

## CHAPTER IV.

<i>Of Master and Servant</i> , . . . . .	99
I. Verbal Contract, . . . . .	101
II. Written Contract, . . . . .	101
III. Implied Contract, . . . . .	102
IV. Duration of the Contract, . . . . .	103
V. Exceptions to the obligation on the Servant to enter and continue in the Service, or on the Master to retain him, . . . . .	106

## CONTENTS.

xi

	Page
VI. Obligations of the Master, . . . .	120
VII. Termination of the Contract, . . . .	133
VIII. Statute Law relative to the Contract of Service, . . . .	136

## CHAPTER V.

<i>Of Master and Apprentice, . . . .</i>	144
I. Origin and Nature of the Contract, . . . .	144
II. Obligations of Master and Apprentice, . . . .	147
III. Dissolution of the Contract, . . . .	149

## CHAPTER VI.

<i>Of Heritable and Moveable Succession, . . . .</i>	151
I. Distinction between Heritable and Moveable Property, . . . .	151
1. Natural Character, . . . .	152
2. Accessory Character, . . . .	152
II. Succession in general, . . . .	155
III. Descent and Consanguinity as applicable both to Herit- able and Moveable Succession, . . . .	156
IV. Heritable Succession, . . . .	158
1. Intestate Heritable Succession, . . . .	158
2. Heritable Succession by Deed, . . . .	162
3. Entails, . . . .	166
4. Conditional Settlements, . . . .	178
5. Law of Deathbed, . . . .	179
6. Entry of the Heir, . . . .	181
V. Succession in Moveables, . . . .	186
1. Intestate Succession, . . . .	186
2. Testate Succession in Moveables, . . . .	188
3. Taxes payable on Succession, . . . .	200

## CHAPTER VII.

<i>Of Trusts and Trustees, . . . .</i>	202
--	-----

## BOOK II.

	Page
OF THE RELATIONS BETWEEN INDEPENDENT MEMBERS OF THE COMMUNITY, . . . . .	208

## CHAPTER I.

<i>Of the Constitution of Contracts in General,</i> . . . . .	209
---	-----

## CHAPTER II.

<i>Of the Contract of Sale,</i> . . . . .	214
I. Sale of Moveables, . . . . .	215
1. Delivery, . . . . .	215
2. Implied Conditions of Sale, . . . . .	219
3. Express Conditions of Sale, . . . . .	223
4. Sale and Return, . . . . .	224
5. Special Warranties, . . . . .	224
6. Payment, . . . . .	225
7. Stoppage <i>in transitu</i> , and retention of Goods by the Seller, . . . . .	225
II. Sale of Ships, . . . . .	229
III. Sale of Heritage, . . . . .	231
1. Constitution and Transmission of Heritable Rights, . . . . .	231
2. Constitution of Feudal Rights, . . . . .	232
3. Transmission of Heritable Rights, . . . . .	235
IV. Sale by Auction, . . . . .	242

## CHAPTER III.

<i>Of the Rights and Burdens attaching to Heritable Property,</i> . . . . .	243
I. Public Burdens, . . . . .	243
II. Servitudes, . . . . .	249

## CONTENTS.

xiii

	Page
III. Stipend, . . . . .	252
The Church, . . . . .	253
The Manse, . . . . .	254
The Glebe, . . . . .	254
Schoolmaster, . . . . .	255
IV. Pigeon-Houses, . . . . .	256
Game, . . . . .	256

## CHAPTER IV.

<i>Of Prescription,</i> . . . . .	257
Forty Years' Prescription, . . . . .	257
The Lesser Prescriptions, . . . . .	260
Vicennial Prescription, . . . . .	260
Decennial Prescription, . . . . .	261
Septennial Prescription, . . . . .	261
Sexennial Prescription, . . . . .	262
Quinquennial Prescription, . . . . .	262
Triennial Prescription, . . . . .	263

## CHAPTER V.

<i>Of the Contract of Letting and Hiring,</i> . . . . .	265
Of the Agricultural Lease, . . . . .	266
Conditions of the Lease, . . . . .	274
Renting of Houses, Shops, and other Subjects, . . . . .	279
Letting and Hiring of Ships, . . . . .	283
Shipmasters, Innkeepers, and Stablers, . . . . .	285

## CHAPTER VI.

<i>Of Pledge and Lien,</i> . . . . .	289
--------------------------------------	-----

## CHAPTER VII.

<i>Of Bankruptcy and Insolvency,</i> . . . . .	294
--	-----

## CHAPTER VIII.

	Page
<i>Of Bills and Promissory Notes,</i> . . . . .	310

## CHAPTER IX.

<i>Of Partnership,</i> . . . . .	327
Partnership Proper, . . . . .	328
Joint Stock Companies, . . . . .	339

## CHAPTER X.

<i>Of Cautionary Obligations,</i> . . . . .	351
---	-----

## CHAPTER XI.

<i>Of Insurance,</i> . . . . .	363
Marine Insurance, . . . . .	364
Fire Insurance, . . . . .	370
Life Insurance, . . . . .	373

## CHAPTER XII.

<i>Of Copyright,</i> . . . . .	375
--------------------------------	-----

## CHAPTER XIII.

<i>Of Patents,</i> . . . . .	383
------------------------------	-----

## CHAPTER XIV.

<i>Of Securities for Debt,</i> . . . . .	389
--	-----

## CHAPTER XV.

<i>Of the Poor,</i> . . . . .	393
-------------------------------	-----

BOOK III.

OF THE MACHINERY OF THE LAW, . . . . .	Page 407
--	-------------

CHAPTER I.

<i>Of the Supreme Courts and Judges of Scotland,</i> . . . . .	407
The Court of Session, . . . . .	407
Departments of the Court of Session, . . . . .	412
I. The Jury Court, . . . . .	412
II. Court of Exchequer, . . . . .	415
III. Teind Court, . . . . .	418
IV. Court of Admiralty, . . . . .	419
V. Commissary Court, . . . . .	420
House of Lords, . . . . .	421
Court of Justiciary, . . . . .	422

CHAPTER II.

<i>Of the Inferior Courts of Scotland,</i> . . . . .	426
I. The Sheriff Court, . . . . .	426
II. Sheriff's Small Debt Court, . . . . .	433
III. Sheriff's Police Court, . . . . .	435
IV. Burgh Courts, . . . . .	435
V. Dean of Guild's Court, . . . . .	436
VI. Justice of Peace Courts, . . . . .	437
VII. Justices' Small Debt Courts, . . . . .	440
VIII. Court of the Lord Lyon, . . . . .	441

CHAPTER III.

<i>Of the Ecclesiastical Courts,</i> . . . . .	447
I. Kirk Session, . . . . .	447
II. Presbytery, . . . . .	448
III. Synod, . . . . .	449
IV. General Assembly, . . . . .	450

## CHAPTER IV.

	<b>Page</b>
<i>Of the Practitioners of the Law,</i> . . . . .	453
1. Advocates, . . . . .	453
2. Writers or Clerks to the Signet, . . . . .	454
3. Solicitors before the Supreme Courts, . . . . .	456
4. Solicitors-at-Law, . . . . .	456
5. Provincial Writers, . . . . .	456
6. Notaries, . . . . .	456
7. Agent and Client, . . . . .	457

## CHAPTER V.

<i>Practical Suggestions with Reference to Judicial Proceedings,</i> . . . . .	459
Civil Actions, . . . . .	460
Litigation by the Poor, . . . . .	461
Criminal Actions, . . . . .	462
 INDEX, . . . . .	 465



# INTRODUCTION.

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## OF THE LAW OF SCOTLAND.

1. **THE** customs which spring from the notions of right and wrong of a rude and simple community, form the groundwork of the legal arrangements of Scotland, as of every other nation.

2. These customs, modified and supplemented by the increased experience, the growing requirements, and the external relations of each generation, and defined by the enactments of the Legislature and the decisions of the Courts, constitute the law of Scotland as it now exists.

3. In the earliest form in which it has been transmitted to us, the law of Scotland bears a close analogy to that of Anglo-Saxon England, and of the other nations of northern Europe which were peopled by Teutonic races. Amongst the external causes which have modified it at a more recent date, there are two which may be singled out as the most important: the intimate connection which subsisted for several centuries between this country and the continent of Europe, more particularly France; and, the Union with England.

1st, To the French connection, which at one time amounted to actual internationalization (1558, c. 66), we trace a large in-

fusion of the principles of the Roman civil law into our law of marriage, of guardianship, of contracts, and the like; and the adoption of several judicial arrangements peculiarly French, such as the constitution of the College of Justice on the model of the Parliament of Paris, and the institution of a public prosecutor of crimes.<sup>1</sup> Similar effects must have been produced by the custom of our lawyers resorting for instruction to the universities of Italy and Holland.

2d, To the Union we ascribe the assimilation which has already taken place, and which is daily going on, between the laws of Scotland and England. This assimilation has hitherto been most perceptible in the different departments of our mercantile law, and in our law of evidence.

4. The statute law of Scotland divides itself into two distinct, and, in many respects, dissimilar portions; the first having been enacted by the Parliament of Scotland previous to the Union, the second by the Parliament of Great Britain.

5. A third division has commonly been made between that which is prior, and that which is subsequent to the reign of James I.; the authority of statute law in the stricter sense being confined to the latter, whilst the former is held “gradually to have lost its force, because not having been preserved from interpolation by any public record.” (Ersk. I. 1, secs. 36, 37.)

6. In this view, the earliest statute now in force is the 11th of the First Parliament of King James I. (1424), “Of Cruves, Zaires, and Satterdaies Slop,” as interpreted by the Act 1477, c. 73, “Anent Cruves.” In both of these Acts reference is

<sup>1</sup> Much of the legal and official terminology by which the law of Scotland is distinguished from that of England, and which it possesses in common with the legal and judicial systems of the continent, is to be ascribed to the same cause. The *overture* of the French estates still lives in the overtures of our ecclesiastical courts; the English mayor with us becomes a provost or *prevôt*, the alderman becomes a *baillie*, the barrister an advocate or *avocat*, the agent a procurator or *procureur*, and the like.

made to an "old statute made by King David," requiring that "ilk heck of the foresaidis Cruves be three inche wide." It thus happens, by a singular chance, that this unimportant regulation as to the mode of catching salmon, is the oldest statutory provision now in force in Scotland. (Burton's Manual of Private Law, p. 2.)

7. In some respects the early legislation of Scotland was advanced beyond that of conterminous and contemporary nations. The important Act by which agricultural leases are made effectual against the successors of the granter, was passed in 1449 (c. 18), and the Act establishing the prescription of obligations by the lapse of 40 years, in 1469 (c. 28). In opposition to the English view, it has always been held that the ancient Statute Law of Scotland may be repealed by desuetude (Stair, B. i., tit. i. 25, Note *a*, Brodie's ed.; Ersk. i., tit. i. 45, notes 12, 13, Ivory's ed.); and the circumstance to which the old statutes, which we have mentioned, owe their binding force at the present day, is consequently not that they were once enacted, but that they have been in continual observance, and are still in accordance with the requirements of the community.

8. The Acts of Sederunt, or ordinances made by the Court of Session for regulating the forms of proceeding to be observed in actions, are likewise regarded as a part of the written law of Scotland: the Court having a delegated power from Parliament to "make sik actes, statutes, and ordinances, as they sall thinke expedient, for ordouring of proces, and haistie expedition of justice." (1540, c. 93.)

# BOOK I.

## OF THE FAMILY RELATIONS.

9. THE family being the original seat of legal as well as of moral rights and duties (Aristot. politic. i. 4–6), it has been customary with lawyers to give to the relations which subsist between its members, and the obligations which spring from them, precedence over those between the members of the same or separate communities simply as such.

### CHAPTER I.

#### OF HUSBAND AND WIFE.

##### *I.—Of the Constitution of Marriage.*

10. Marriage, in the eye of the law of Scotland, as of that of Rome, is a civil contract, constituted, like every other civil contract, by consent. (Ersk. i., tit. vi. 2, D. lib. 50, tit. 17, l. 30, and lib. 35, tit. 1, l. 15 ; Confess. of Faith, xxiv. 3.)

11. Nor does the fact of consent to this contract require to be established by any peculiar civil solemnities, but admits of being proved by ordinary evidence, either parole or written. (Ersk. i., tit. vi., secs. 5 and 6 ; Fraser, i. 145, 147.)

12. Fully alive, however to the peculiar importance of this contract, of which Lord Stowell has justly said (*Dalrymple v. Dalrymple*, 2 Hag., p. 63), that it is the “parent, not the child of civil society,” the law of Scotland has always watched with jealous care over the *completeness* of the evidence by which it is

alleged to be established. Moreover, the circumstance of its being constituted in the same manner, does not place the contract of marriage in all respects on a footing of equality with other civil contracts. Being, as Lord Stair observes, “a divine and not a human contract,” the obligations arising from it are not like those which “take their rule and substance from the will of man.” (Stair, 22. 1.) It cannot, for example, be arbitrarily limited in its duration (Ib. 23. 5); it cannot be so framed as to invert the relative position which nature has assigned to the sexes; it cannot be entered into by parties within certain degrees of relationship (Confess. of Faith, xxiv. 4; Stair, 783. 19), and the like.

13. In consequence of this peculiarity in its nature, there are certain impediments to marriage which are not impediments to the formation of other contracts. In other respects the following observations are general, and may be regarded as a statement of the principles by which all contracts are governed.

14. *Legal consent* must be voluntary and intelligent; and persons who are either actually, or whom the law presumes to be, incapable of such consent, are consequently incapable of marriage. (Stair, 24. 6; Ersk. iii. 1. 16; Fraser, i. 226.)

15. For this reason, neither idiots, madmen, nor pupils can marry; and a marriage will be invalidated by force, fear, error in substantials, or extreme intoxication. (Fraser, i. 48 and 226, *Johnston v. Brown*, Nov. 15, 1823, and *Ferg. Rep.*, p. 229; *Sullivan v. Sullivan*, 2 Hag., p. 246.)

16. Twelve in females, and fourteen in males, being the ages at which their pupilarity ceases, are the ages at which they may respectively marry. This arrangement, which was probably borrowed by us from the Roman law, and which may have been suited to the climate of Italy, can scarcely ever have been free from inconvenience in this country. It is to be remarked, however, that twelve was the legal age of majority for certain public purposes among the Anglo-Saxons, and seems to have been so

generally amongst the Teutonic tribes. (See Kemble's Saxons in England, vol. ii., p. 35, and note.)

17. Extreme youth of one of the parties, even where the years of pupilarity have been passed, has always been regarded in Scotland as raising a presumption that he has been the victim of fraud; and circumstances which, in the case of persons more advanced in life, would not be listened to, will be regarded as important in judging whether a very young person has given that free and intelligent consent which alone constitutes marriage. (Cameron *v.* Malcolm, M. 12586; Allan *v.* Young, Dec. 9, 1773, Ferg. Rep., p. 37; and Fraser, i. 234 and 236.)

18. The consent of parents or guardians does not enable pupils to marry; and is not necessary to the marriage of minors. (Stair 28, note; Ersk. i., tit. 6. 6; Fraser, i. 44.)

19. The consent which constitutes marriage must be to a *present* act; and, consequently, all ante-nuptial contracts, sponsalia, and other promises to marry, whatever may be the form of their expression, may be resiled from. (Stair, i. 4. 6; Ersk. i., tit. 6. 3; Fraser, i. 101, *et seq.*) They then become grounds for actions of damages. (Ib. i. 162. 3.)

20. Where sexual intercourse has taken place between the parties subsequent to a promise of marriage, the law of Scotland holds these combined facts, if proved, to amount to a proof not of future intention, but of present consent, and thus to constitute "very marriage." (Ersk. i. 6. 4; Fraser, i. 164.)

21. It has been keenly discussed amongst lawyers, whether promise followed by copula is itself a completed marriage, or is only a ground on which either of the parties may force the other to complete a marriage, by raising an action, the object of which is to call upon the Court to *declare that it is already completed*. This absurd question, which, if answered in accordance with the second alternative, assumes that the Court can add to the consent of the parties, is still seriously agitated, and may

come to be of great importance in determining the legitimacy of children, if raised after a second marriage, or after the death of either of the parents has rendered solemnization impossible. Apart from the confusion in which the subject is usually involved by the manner in which it is discussed, it seems plain that the promise and copula are simply tokens of consent which the law recognises, that the declarator can go no farther than to determine whether or not they are present in the special case, and consequently that the date of the marriage is the date of the copula. (Fraser, *ibid.*)

22. It is not uncommon, where there has been sexual intercourse, but where the promise is doubtful, to insert in the summons of an action of declarator of marriage by the woman, an alternative conclusion for damages for seduction. (Fraser, *ii.* 636.)

## II.—*Of Regular Marriage.*

23. The ordinary form in which express consent is given, in Scotland as elsewhere, is by a solemn vow of the parties, uttered before a clergyman, in the presence of at least two witnesses.

24. It is not the practice for Presbyterian marriages to be celebrated in church, though the Westminster Directory requires that they shall be publicly solemnized by the minister "in the place appointed by authority for public worship." To the civil law, the place of celebration is a matter of perfect indifference.

25. A regular marriage must be preceded by the publication of banns.

26. This proclamation, by which a purpose of marriage is announced, and all concerned are required to state any valid objection which they may know to the proposed union, takes place in church, when the people are met for divine worship, either on three several Sundays, or, as is now more usual, three times on the same Sunday. The session-clerk cannot proclaim banns until the parties have resided six weeks in the parish. (Act of

Assembly viii. 1784; Ersk. i. 6. 10.) Where the parties reside in different parishes, proclamation must be in both. (Act of Assembly 1699, c. 5; and Regulations of 1782 and 1784, c. 8; see also Cook's Styles of Procedure, p. 32.) In populous parishes, where the session-clerk must often have no personal knowledge of the parties, they must bring him a certificate, signed by two householders, or by an elder, stating that one or both of them have been residents in the parish for six weeks or more; and that they are unmarried. (Cook's Styles of Procedure in Church Courts, p. 33.)

27. *Registration.*—It is required, by 17 and 18 Vict., c. 80, that in all cases of regular marriages, when the certificates of the proclamation of banns are given out, that they shall be accompanied by a copy of the schedule (C.); and that, upon the solemnization of the marriage, such schedule, having all the information thereby required inserted, shall be produced to the minister, or the person solemnizing the marriage according to the rites of Jews or Quakers; or shall be filled up in the presence of the minister, and signed by the parties contracting the marriage, and by the witnesses, male or female, present thereat, not being less than two, and also by the minister; and shall be delivered to the parties, who, within three days, shall either deliver it, or send it by post, to the registrar of the parish wherein the marriage was solemnized (sec. 46).

In an English Act (19 and 20 Vict., c. 119), it is provided that, where one of the parties intending to marry without license is resident in Scotland, a certificate of proclamation of banns in Scotland, by the session-clerk, shall be valid and effectual for authorizing the solemnization of marriage in England (sec. 8). There is no reciprocal Act; but the invariable practice in Edinburgh is to make the proclamation if one of the parties has been resident for the requisite period. The same rule is followed in the case of soldiers and sailors.



28. *Dissenters.*—Till a recent period, only the clergy of the Established Church of Scotland could celebrate regular marriages. The statute 10 Anne, c. 7, allowed Episcopal clergymen, who had taken the oaths to government, to do so; and this privilege was extended by 4 and 5 William IV., c. 28, to all persons in holy orders, of whatever communion, after proclamation of banns in the Established churches of the parishes of both parties. In the case of Episcopalians, the statute requires that proclamation shall also be made in the chapel.

29. The form of the marriage service, both in the Presbyterian and Episcopalian Churches, is in strict accordance with the principle of the marriage being the result, not of the ceremony, but of the expressions of mutual consent. In the Presbyterian Church the clergyman declares the parties to be married; in the Episcopal Church he is instructed to say, "Forasmuch as these two have *consented together*, I pronounce that they be man and wife together."

### III.—*Of Irregular and Clandestine Marriage.*

30. All marriages which are not celebrated by a clergyman after proclamation of banns, are irregular; and such of these irregular marriages as are entered into before a person professing to act as a religious celebrator, without being a minister of religion, are clandestine, and expose the parties, the celebrator, and the witnesses, to certain penalties.

31. Express consent may be either in words before witnesses, or in writing by the parties. No particular form is required either for a verbal or written declaration, the only indispensable requisite being, that the fact of present resolve shall be rendered indisputable. (*Ante*, p. 4.)

32. A single example in illustration of the preceding section may be given. In a recent case, the parties had corresponded during a period of upwards of thirty years—first as "betrothed

husband” and “betrothed wife,” and then as “husband” and “wife.” No one ever knew of their being married ; and the man, who was a minister of the Church of Scotland, subscribed to the Widows’ Fund, and registered himself as a bachelor. No *copula* was proved. After the man’s death, the woman brought a declarator of marriage, founding on the correspondence, and the Court found that the marriage was proved. (*Leslie v. Leslie*, March 16, 1860.)

33. Matrimonial consent will be inferred from “habit and repute,” that is, from cohabitation of the parties, and from their having the reputation of being married. (*Stair*, 24. 6, 783. 19 ; *Fraser*, i. 202, *et seq.*) The cohabitation must have been in Scotland (*Ersk.* i., tit. vi., note to Ivory’s Ed., p. 122), and the repute must not be founded on a single circumstance, or confined to a few individuals, but must be general in the neighbourhood, unequivocal, and of considerable duration.

34. If the connection has begun in concubinage, a very palpable change of purpose will be required in aid of the proof of public opinion.

35. By 19 and 20 Vict., c. 96, it is enacted, “that, after the 31st December 1856, no irregular marriage shall be valid in Scotland, unless one of the parties has lived in Scotland for the twenty-one days next preceding the marriage, or has his or her usual residence there at the time.” It is further enacted, that the parties to such a marriage may apply within three months, *jointly*, to the Sheriff or Sheriff-substitute of the county for a warrant to register it. Upon proof that one of them had lived for twenty-one days, or had his usual residence in Scotland, and that they have contracted marriage, the Sheriff is to grant a warrant to the Registrar of the parish, to record the marriage. A certified copy of the entry, signed by the Registrar, which he is bound to give for 5s., is declared to be evidence of a valid marriage.

IV.—*Of the Impediments to Marriage.*

36. There are certain incapacities to marriage which do not affect other contracts.

37. Impotency, being an incapacity to perform the duties of this contract, is a bar to its formation. Impotency cannot be pleaded by a third party. (Bell, Prin. 1524 ; Hume, Com. 456.) When judicially established by either of the parties themselves, it is held by the Court to be a ground, not for dissolving the contract, but for declaring that no contract ever existed. (Ersk. i., tit. vi., sec. 7 ; Fraser, 50, *et seq.*)

38. Previous marriage, whilst subsisting, forms an incapacity, which will not be removed by the fact that the party may have believed in its dissolution by the death of his partner. (Dalrymple v. Dalrymple, 2 Hag., p. 63 ; Fraser, p. 79.)

39. Adultery is a statutory impediment to marriage between the adulterers. (1600, c. 20.) As to whether this statute is in desuetude, see Mr Fraser's Domestic Relations (vol. i., p. 82, *et seq.*).

40. Relationship within certain degrees, either of consanguinity or affinity, renders the parties incapable of contracting matrimony.

The forbidden degrees are the following :—

1. Ascendants and descendants,—*i.e.*, parents and children, grandparents and grandchildren, etc., to the most distant degree.
2. Collaterals in the first degree,—*i.e.*, brothers and sisters.
3. Collaterals who stand *in loco parentis*,—*i.e.*, where the one party is brother or sister to the direct ascendant of the other.

41. There is no difference between full and half-blood.

42. The degrees which are prohibited in consanguinity are so in affinity.

43. The question of the validity of a marriage with the sister of a deceased wife has recently been decided in Scotland for the

first time in the negative (Livingston, January 24, 1861); the Court holding that such marriage is not lawful according to the statute law of Scotland, and the issue are illegitimate, the relationship by affinity being the same as by consanguinity. The connection, when occurring in the wife's lifetime, has been held to be incest by the Court of Justiciary. (John Oman, Inverness, April 14, 1855, Irvine, ii., p. 149.) But the sentence of transportation for fourteen years which was pronounced in this case, was remitted, on application to the Home Secretary, conditionally on the panel not living in Scotland during that time.

V.—*Effects of Marriage on the Personal Status and Property of the Spouses.*

44. In the eye of the law, the person of the wife is sunk in that of the husband. It is in obedience to this principle that she assumes his name and rank, that she becomes legally subject to him in all domestic and conjugal affairs, and that he is her curator, with powers in some respects more extensive than those which belong to the curator of a minor. With the exceptions mentioned in the following section, the husband is still the sole and absolute manager of the proceeds of the heritable property of the wife, and of the common fund which is created by the union of the moveable property which belonged to the spouses before, or which may accrue to them during the marriage. (Fraser, i. 238.)

45. This doctrine is somewhat modified by the 16th sec. of the recent Conjugal Rights Act (24 and 25 Vict., c. 86), which provides that, "when a married woman succeeds to property, or acquires right to it by donation, bequest, or any other means than by the exercise of her own industry, the husband and his creditors, or any person claiming under or through him, shall not be entitled to claim the same as falling within the *communio bonorum*, or under the *jus mariti*, or husband's right of administration, except on condition of making therefrom a reasonable

provision for the support and maintenance of the wife, if a claim therefor be made on her behalf;" and, in case of desertion, by the 1st sec., which empowers the wife in such circumstances to apply for an order of Court to protect such property as she has or may acquire by her own industry, or which she may succeed to, against her husband and his creditors.

46. The personal obligations of married women are invalid; and, consequently, they cannot, except in virtue of the powers conferred on them by the statute just referred to (24 and 25 Vict., c. 86), grant bonds, bills, or promissory notes. Even where a bill granted by a woman before marriage was discharged, and renewed by another bill after marriage, the renewed bill has been held not effectual against her. (Stair, i. 4. 16; Ersk. i. 6. 22; Fraser, 245, *et seq.*; Balfour v. Ewing, 5th Mar. 1831.)

47. The husband's consent will not validate the wife's obligation, because he cannot authorize her to shake off the disability which the law has imposed. But in certain cases—as, for instance, a bond granted by the wife over her separate heritage—the husband's consent will give legal completeness to the obligation, when coupled with the ratification of the wife out of the presence of the husband and before a judge. (Ersk. i. 6. 27; Fraser, i. 425; Menzies's Lectures, p. 37; Clerk v. Gibson, 24th Jan. 1826.)

48. The object of this ratification is to protect married women against the risk of being unduly influenced by their husbands. Its effect is to raise up a presumption that the deed was the voluntary act of the wife; but it does not seem to cut her off from the allegation, that in granting the ratification itself she was influenced by force or fear; and deeds have been reduced on this ground, at the wife's instance, though ratified by her. (M'Neill v. Steel's Trustees, Dec. 8, 1829, and Menzies's Lectures, p. 40.) On the other hand, where a wife, with consent of her husband, disposed heritage in security of her husband's debt, but refused to execute a ratification, it was held that the deed

was not reducible on the ground of non-ratification, unless force, fraud, or undue influence by the husband was proved. (Ersk. i. 6. 36 ; Fraser, p. 434 ; *Buchan v. Risk*, Mar. 1, 1834.)

49. From the wife's inability to enter into obligations, it follows that she cannot sue or be sued at law. (Ersk. i. 6. 21.) This disability continues to subsist even after the dissolution of marriage by the death of the husband, as regards all obligations entered into during its subsistence,—the view of the law being that they never were contracted. But a bond entered into during marriage may be rendered effectual by being acknowledged and acted upon after the marriage has been dissolved. (Erskine, iii. 3, 47 ; Fraser, i. 254 ; *Wemyss v. Stewart*, 2 Mar. 1773.) And in case of separation, under the 6th sec. of 24 and 25 Vict., c. 86, the property of the wife belongs to her, exclusively of the *jus mariti* and right of administration, and she may contract and sue and be sued as if she were not married.

50. Though a wife cannot be obliged, she may insist on the fulfilment of obligations which have been entered into with her by others who were aware of her situation. This privilege belongs to married women in common with minors and pupils. Of course the wife must perform her part of the contract to the person whom she thus compels to perform his. (Fraser, i. 255 ; *M'Kenzie v. Fraser*, 18th May 1827.)

51. Previous to the passing of the Conjugal Rights Bill above referred to, there were certain exceptions to the rule that obligations by married women are null, and these exceptions still remain.

(1.) A contract by a married woman will be effectual against her separate estate, if the subject of the debt has been applied for her own peculiar benefit in a matter which was not legally and properly a debt of the husband. Debts contracted by her before marriage, and monies expended on improvements of her estate, or expenses incurred in the management of her property,

are held to be in this position. (*Harvey v. Chessels*, Bell's Cases, p. 255 ; *Fraser*, p. 255.)

(2.) A wife can execute a testament as to her separate estate without her husband's consent ; but it is doubtful if she can contract a personal obligation which is not to come into operation till after the marital power has ceased. (*Miller v. Milne's Trustees*, Feb. 3, 1859.) Till recently, her power of testing extended to her portion of the goods in communion ; but by the Act to regulate intestate succession in moveables (18 Vict., c. 23), it is provided (sec. 6), that in case of the wife's predecease, whether testate or intestate, her representatives shall have no right to any share of the goods in communion ; nor shall any legacy, or bequest, or testamentary disposition thereof by such wife, affect or attach to the said goods or any portion thereof.

(3.) Where a wife fraudulently holds herself out to be unmarried, she will be bound. (*Fraser*, i. 259, ii. 235, and authorities referred to.)

(4.) It has been held that, where she incurs a fine for a crime which she has committed, her separate estate may be attached for its payment ; but her person cannot be attached, with this object, during the subsistence of the marriage. (*Fiscal of Lanarkshire v. M'Luckie*, 20th Jan. 1796, *Hume's Decis.*) She may be imprisoned as a criminal, but cannot be imprisoned as a debtor for her fine. In order that married women may not be deprived of the benefit of redeeming themselves from imprisonment by the payment of a fine, which would be the practical result of this view of the law, it is said to be the practice in some criminal courts to pronounce a sentence of imprisonment for a specified time, unless a specified fine be sooner paid. (See *Barclay's Digest*, voce *Marriage*.)

(5.) Where the husband is civilly dead, *i.e.*, where he has been outlawed for not appearing to stand trial for a crime. (*Fraser*, i. 259.)

(6.) Where the husband is insane, his curatorial powers are at an end, and the wife may manage and even alienate her property. (Ib. i. 261.) See *ante*, sec. 45.

(7.) Where the spouses live separately, and the wife has an aliment, that aliment may be attached by a creditor for debts which she has contracted *for necessities*. The husband, having supplied her with a suitable provision, will be free from all further liability. (Ib. i. 262.) See *ante*, sec. 5.

(8.) Where the spouses are judicially separated, the wife will have a separate aliment allocated to her by the Court; and this a creditor may attach, provided the debt incurred be for necessities. (Ib. i. 263; *Baillie v. Letham*, M. 5998.)

(9.) Where the wife, deserted by her husband, has obtained an order from the Court of Session, under the provisions of 24 and 25 Vict., c. 86, for the protection of the property which she has acquired by her own industry, or to which she has succeeded; or where a married woman, having succeeded to property, has claimed it on her own behalf, under the 16th sec. of the same Act, the obligations to which she may have subjected such property to third parties will be valid. (Sec. 3.)

(10.) Where a wife has been compelled by ill-treatment to desert the society of her husband, she may incur a debt for necessities, which will be binding on him; and the same is the rule where she is deserted by him. (*Fraser*, i. 264, 319.)

(11.) When the husband is abroad, the obligations of a married woman will be effectual so far as they are for necessities to herself and her family. If, in order to obtain a livelihood, she should, in such circumstances, commence business as a merchant, keep a tavern, or the like, she may enter into contracts relative to such business, and these contracts may be enforced by diligence against her. As soon as her husband returns to the country, the obligations for necessities which she has incurred may be enforced against him, but her powers of independent action



cease. If she still continues to trade, she is presumed to do so with his consent, and her deeds are binding not on her, but on him. (*Churnside v. Currie*, M. 6082 ; *Orme v. Diffus*, Nov. 30. 1833 ; *Fraser*, i. 264.)

52. *Curator ad Litem*.—As a wife cannot sue or be sued in her own name, except under the provisions of 24 and 25 Vict., c. 86, the Court is in use to appoint a *curator ad litem* to supply the place of the husband in cases in which she has a separate interest, or where he will not appear as a pursuer, or cannot be cited as a defender.

53. The general case in which a curator is appointed, is when the husband is insane, abroad, or in banishment, where his residence is unknown, where he refuses unreasonably to concur, or where the wife is obliged to institute an action against him. (*Stair*, i. 4. 15 ; *Ersk.* i. 6. 21 ; *Fraser*, i. 276.)

54. A wife will not be allowed to sue her husband except on necessary or urgent occasions, as for aliment, judicial separation, divorce, or implement of her marriage contract when he is on the verge of bankruptcy. (*Ersk.* i. 6. 21 ; *Fraser*, i. 283.)

55. *The domicile of the wife* follows that of the husband ; and she must be cited to the court which has jurisdiction over him, except in those special cases in which she can be proceeded against separately. (*Stair*, i. 4. 9 ; *Ersk.* i. 2. 16, n. 22.)

56. The husband becomes liable for the moveable debts of the wife contracted before marriage, even where she had no separate estate. (*Fraser*, i. 284.) Amongst her moveable debts are included interest on heritable bonds, or other heritable debts, whether due prior to marriage, or falling due during its subsistence. (*Ib.* 286.)

57. The husband is liable for his wife's marriage clothes, as they are supposed to have been purchased for his peculiar benefit (*Neilson v. Guthrie*, M. 5878 ; *Alston v. Philip*, M. 6007) ; but he is not liable for her ordinary clothes if she resided in family

with her father previous to the marriage (*Bannatyne v. Clark*, M. 5860).

58. Though the husband has renounced his right of administration, and every pecuniary advantage from the marriage, his liability for the debts of the wife still continues; the principle being, that "by marrying her he withdraws her body from personal diligence," and must put himself in her stead. (*Ante*, sec. 51. 4.)

59. A debt contracted by the wife after proclamation of banns, is held not to be a debt before marriage; and, in so far as the husband is concerned, it is null, except to the extent mentioned in sec. 57.

60. The liability of the husband ceases with the dissolution of the marriage, either by death or divorce; and hence a decree against him for a debt of the wife's is qualified. She is herself decerned against as principal debtor, and the husband for his interest. Execution against the wife is superseded during the marriage. (*Ersk. i., tit. vi., sec. 16*; *Fraser, i. 289. 290.*)

61. The husband's heritable as well as his moveable property is liable to diligence for this purpose (*Ersk. i. 6. 7*; *Stair, i. 4. 17*, *Brodie's note*); and wherever either moveables or heritage have been actually attached, the death of the wife will not release them. (*Ersk. i. 6. 17*; *Fraser, i. 291.*)

62. Where the wife is possessed of a separate heritable estate, the husband is entitled to relieve himself from it for her debts which he has paid, whether heritable or moveable. (*Bell's Prin. 1571*; *Gordon v. Maitland, M. 11161.*)

63. The rule regarding the heritable debts of the wife is, that the husband is liable for them only to the extent to which he is enriched (*lucratus*) by the marriage. (*Ersk. i. 6. 17*; *Fraser, i. 292.*)

64. A husband who has only received a moderate tocher is not held to be enriched, he being himself regarded as a creditor for a provision to that extent.

65. What is a competent tocher, is a question to be determined according to the circumstances of each case, and when contested is entirely in the discretion of the Court. (Ersk. i. 6. 17; Fraser, i., p. 293; and cases cited.)

66. Even after the dissolution of the marriage, the husband continues to be liable for the wife's debts to the extent to which he is held to have been a pecuniary gainer. (Smith v. Drummond, 2d July 1829.)

67. Where the wife has conveyed her whole property, heritable and moveable, to the husband, he is liable for all her debts, even after the dissolution of the marriage. (Ersk. i. 6. 18.)

68. The wife's heirs are liable before the husband, even where he is *lucratus* by the marriage. (Ersk. i. 6. 17.)

69. There are certain cases in which, even during marriage, the wife is able to contract so as to bind the husband. This exception to the general rule proceeds on the principle, that in these cases she acted as his agent.

70. The wife is presumed by the law to be set over the domestic affairs of the family, and entrusted with their management (*præposita negotiis domesticis*); and, consequently, the husband is held to have consented to all contracts that are entered into by her in that capacity.

71. In this respect, however, the position of the wife is not peculiar, as the same rule holds with reference to a daughter or any other recognised housekeeper. (Stair, i., tit. 4; Brodie's note, p. 31; Fraser, i. 298.)

72. It is only for *necessaries* that the husband is thus liable; but this word will be so construed as to include whatever is suitable for a family in the station of life occupied by the husband. Nor is it confined to the furnishings of the family, but is held to include all expenditure on the part of the wife which is absolutely indispensable, from whatever cause. (Fraser, i. 299.) On this ground, a husband has been held liable for the expenses

incurred to an agent for carrying on an action of declarator of marriage, in which he himself was defender (*M'Alister v. Husband*, Mor. 4036), and for defending her in an action of divorce in which she was unsuccessful (*Gray v. Mickle*, Mar. 10, 1803). But such will not be the case if the proceedings have had reference to her own estate. (*Macara v. Wilson*, Feb. 15, 1848.)

73. A tradesman, dealing with a married woman, is bound to exercise a sound discretion as to the character of the goods furnished to her, as her husband will not be bound if they altogether exceed, either in quantity or quality, the reasonable requirements of a person in her condition. (*Ersk. i. 6. 26*, and 19.)

74. If it is in his power to return the goods, and he omit to do so, he will be liable; and it will be no answer to say that the wife is disobedient, as it is his duty to exercise his marital rights. (*Ersk. ut sup.*)

75. The presumption that the debt was incurred with the husband's authority, will be repelled by evidence showing that the credit of the wife was alone relied on by the tradesman. (*Binny v. Smith*, 26th Jan. 1836.)

76. The husband will be liable for articles of dress or ornament, which the wife has worn in his presence without his objecting. (*Fraser, i., p. 303*; and English cases cited.)

77. The husband's liability will not be removed by having given money to the wife for the purpose of paying a debt, if she has not applied it to that purpose. (*Ersk. i. 6. 26.*)

78. The wife cannot borrow money in her capacity of domestic manager; and in order to render the husband liable, it must be shown that it has been actually expended either for his benefit or for the aliment of the wife. (*Fraser, i. 305.*)

79. If the husband has acknowledged the debt, by asking indulgence from the creditor, or by paying interest, he will be liable. (*Grant v. Baillie*, 26th Feb. 1830.)

80. The wife cannot sell or pledge money or furniture belong-

ing to the husband. (Bell's Prin., sec. 1567 ; *Nairn v. Buchanan*, M. 1669 and 6016.)

81. She is entitled to hire domestic servants without his authority. This point does not appear to have been determined in Scotland, but it has been so fixed in England. (Fraser, i., p. 306.)

82. The separate estate of the wife is not liable for alimentary or necessary debts which she has incurred for the family, even if the husband should be bankrupt. (Ersk. i. 6. 26 ; *Sandilands v. Mercer*, 30th May 1833.)

83. In addition to the cases in which the law presumes the consent of the husband from the mere fact of the marriage, there are others in which it will be presumed from special circumstances. In these the wife holds to the husband the position of a mandatory. The question, what circumstances will suffice to raise up this presumption, belongs to the law of evidence ; and the answer to it depends so much upon the specialties of each particular case, as scarcely to admit of being given in general terms. (Dickson on Evidence, vol. i., 313 ; and cases referred to.)

84. If for a length of time the husband has fulfilled the wife's engagements, his consent will be presumed. It is generally in the case of their carrying on some sort of joint trade, such as keeping an inn, that she is held to bind him in business transactions. (Ersk. i. 6. 26 ; Fraser, i. 309 ; *Buchanan v. Dickie*, 17th June 1828 ; *Wood v. Downie*, 15th June 1857.)

85. It is said that the wife may be specially constituted commissioner to the husband ; and in that capacity may manage his heritable estate, grant leases, burthen his property with debt, enter vassals, and even sell. Further, that she may be appointed his factor or agent, and as such may grant bills for him, and enter into contracts as an ordinary agent ; the husband in such cases being liable in damages for the wrongous acts of the wife. (Fraser, i. 310.)

86. But, in general, no act by a wife during her husband's lifetime is excepted from her curatory; and where his consent is attainable, it ought always to be procured, especially in any transaction having reference to heritage.

87. A wife cannot enter into a contract of copartnership with her husband to carry on a trade with him, though possessed of funds independent of him. (*Macara v. Wilson*, Feb. 15, 1848.)

VI.—*How the Husband ceases to be liable for the Wife's Debts.*

88. *Inhibition* is a species of legal notification to which the husband must resort, in order to free himself from liability for his wife's acts in those cases in which his consent is presumed by the law. It is in his power to resort to this expedient whenever he wishes to depose his wife from the office of domestic manager which the marriage has conferred; and he may use it according to his pleasure or caprice, with reason or against reason. The object of conferring this arbitrary power on the husband, is to prevent the necessity of exposing domestic quarrels to the judgment of a court or a jury. (*Stair*, i. 4, secs. 15 and 17; *Ersk.* i. 6. 26; *Bell's Prin.*, sec. 1566; *Fraser*, i. 313.)

89. The inhibition is in the form of a judicial prohibition, addressed to the wife, forbidding her to dispose of her husband's effects, or contract debts, and to the lieges in general, forbidding them to buy his goods from her, or give her credit. (*Jurid. Styles*, 2d Ed., vol. iii., p. 540.)

90. The inhibition must be executed both on the wife and the public. The *first* is effected by a messenger-at-arms serving a short copy on her at her residence; the *second*, by publication at the head burgh of the shire where the husband resides, and by registration either in the particular register of the shire, or in the general register of inhibitions at Edinburgh. (*Fraser*, i. 814.)

91. No particular intimation of the inhibition to the merchants

with whom the wife was in the habit of dealing is necessary; and it will be operative against them even should they be ignorant of its existence. The effect will be the same though the merchants be resident abroad, it having been decided that "the diligence, being regular according to the law of Scotland, must be effectual against all mankind." (*Topham v. Marshall*; *Mor. App. v. Inhibition*, No. 2 (1808).)

92. The only exception to the validity of an inhibition is where the husband fails to provide the wife with a sufficient maintenance. In that case she may contract in so far as is necessary for her own subsistence. (*Gordon v. Sempill*, *M. App. Husband and Wife*, 4.)

93. Even after inhibition, the wife may contract with her husband's consent; and this consent may be inferred from his knowing and approving of her transactions. (*Kerr v. Gibson*, *M. 6023*.)

94. Private notice to a tradesman, in so far as the particular instance is concerned, is equally effectual with inhibition. (*Buie v. Gordon*, 23d Feb. 1827.)

95. Where the husband and wife have separated, either by mutual consent or in consequence of maltreatment by the husband, the law will no longer *presume* that the wife has his authority for incurring debts for domestic purposes. The only grounds on which a tradesman will be entitled to recover from the husband, in such circumstances, will be that the debts were incurred for the wife's personal maintenance. (*Ersk. i. 6. 19. 25. 26*; *Fraser, i. 318*.)

96. Though a husband has turned his wife out of doors for adultery, he cannot exempt himself from the obligation to maintain her by an advertisement in a newspaper cautioning the public not to trust her; nor, beyond the particular instance, by notice to individuals not to give her credit. (*Ib. 319*, and English cases cited in note.)

97. But where the wife, without sufficient cause, leaves the husband, he is not bound to furnish her with a separate aliment, nor will he be liable for the debts which she contracts for that purpose. (Ib.)

98. Where a wife went to London without her husband's consent, it was found that he was not liable even for her necessary furnishings whilst there; but the case is an old one. (Countess of Caithness *v.* the Earl, M. 5886; Fraser, i., p. 320.)

99. In order that the husband's liability for aliment may continue, the wife must assign such a cause for leaving him as a court or a jury can entertain, and not such as has its existence only in the mind of a fanciful and capricious woman. (Connal *v.* Connal, 18th June 1833.)

100. Adultery on the part of the husband, or the introduction of a prostitute into his house, will be sufficient. (Horwood *v.* Heffer, 3 Taunt. 421.)

101. If no inhibition has been used, and no notice given to the tradesman, the onus of showing that he knew of the separation will lie on the husband.

102. It has been held in England, that if the tradesman was aware of the fact of separation, he must accept the onus of showing that it took place in such circumstances as not to free the husband from liability. (Fraser, i. 321; and English cases.)

103. If, during her desertion, the wife become insane, the husband is bound to maintain her, because from that moment she no longer has the will to violate the duty of conjugal adherence; and she is held no longer to do so. (Scott *v.* Selbie, 20th Jan. 1835.)

104. Where the husband has made a suitable allowance for a separate establishment to the wife, tradesmen who deal with her must rely on this allowance alone; and no intimation will be required to free the husband from liability. (Stair, i. 4. 16; Ersk. i. 6. 25; Fraser, i. 321.)



VII.—*Of the Community of Goods.*

105. *The community of goods* amongst the Teutonic races, to whom its origin has been traced, was an actual partnership between the spouses; bringing along with it equal rights both to the property and management of the common fund. On being adopted by the customary law of France, the doctrine of the *communio* underwent an entire change. The husband became “lord of the moveables and conquest heritage,” and the wife’s right resolved itself into a claim to a certain portion of them (a half or a third) after his death. The name, no longer retaining its original signification, continued to hold its ground in France, and was imported into Scotland, towards the end of the reign of Charles II., by the lawyers, who were then almost invariably educated in France. But the arrangement regarding the moveable property of the spouses which had formerly prevailed in Scotland, being not very dissimilar to that which had grown up in France, underwent no very serious alteration; and the doctrine of the community of goods, though supported by the high authority of Lord Stair, never was accepted in Scotland to the extent of establishing an equality of rights between the parties, or extensively affecting the marital powers of the husband.<sup>1</sup>

106. The true doctrine of the law of Scotland, and that which has since been followed in the courts, was laid down in 1842:—“The absolute power of use and disposal being in the husband,” said the consulted judges, “we must consider the goods, *nominally* in communion, as truly his, not at all the wife’s property.” (Shearer *v.* Christie, Nov. 18, 1842, S. and D., p. 140.)

107. In accordance with this view, it has been further decided (Fisher *v.* Dickson, 16th June 1840; affirmed 6th April 1843)

<sup>1</sup> This interesting speculation, the soundness of which has not been universally admitted, will be found at full length in Fraser, i. 322, *et seq.*

that the claim of the wife on the estate of the husband, after his death, is not a claim to the division of a common fund, but simply a right of debt by which the wife becomes a creditor of the husband's executors. The same doctrine has been applied to the claim of the children for legitim, hereafter to be mentioned.

108. In apparent consistency with the doctrine of a community of property, the husband, till the passing of the recent Moveable Succession Act, was bound, in the event of the wife predeceasing him, instantly to account to her heirs for her half of the goods. By that Act (18 Vict., cap. 23), in accordance with what we have seen to be the true principle of the husband's proprietary, it is provided (sec. 6) that, "where a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy or bequest or testamentary disposition thereof, by such wife, affect or attach to the said goods, or any portion thereof."

109. Another provision which was borrowed by our law from that of France was to the effect that, if the marriage was dissolved within a year and day without a living child, all that either spouse had received from the other must be returned. By the 7th sec. of the Act to which we have just referred, the distinction between this case and the case of a marriage which has endured for a longer period is removed.

110. The proprietary powers of the husband are confined to the moveable estate of the wife; whatever the law of Scotland holds to be heritable, remains the property of the wife. (Stair, i. 4. 9; Ersk. i. 6. 12.)

111. The distinction between heritable and moveable, or, in English phraseology, between real and personal, property being in general (see *Jus Relictæ*) the same when applied to the rights of husband and wife as of heir and executor, will be considered under Succession.

VIII.—*How the Husband's Power is Excluded.*

112. The conjugal power of the husband may be excluded either by the nature of the subject, by implication from the position of the other parties, by express arrangement, or under the statutory provisions of 24 and 25 Vict., c. 86.

113. A provision for the support and aliment of the wife, whether proceeding from a third party or from the husband himself, is removed beyond his control. (*M'Gregor's Trustees v. M'Gregor*, 22d Jan. 1820.) He cannot demand it when due by a third party, and his discharge would not be a sufficient discharge to a debtor, though, as matter of prudence, the third party should always require the husband's concurrence to the wife's discharge.

114. But the wife cannot assign an alimentary fund without the husband's concurrence, otherwise than in accordance with 24 and 25 Vict., c. 80, secs. 45 and 51 (9). A decision to this effect was pronounced, where the *jus mariti* was not only excluded from the fund in question, but where the husband was absent from Scotland, and where the assignation was granted in security of money advanced to him at the wife's request, to enable him to retrieve his affairs. (*Rennie v. Ritchie*, April 25, 1845, 4 Bell, H. of L. 221.)

115. If the alimentary provision be greatly in excess of the requirements of a person in the social position occupied by the wife, it will, to the extent to which it is in excess, be attachable by the husband's creditors. (*Fraser*, i. 393; and cases.)

116. If the alimentary provision has proceeded from a third party, by whom the power of the husband has been expressly excluded, it will not be attachable, however large, either by the husband or his creditors. (*Ib.*)

117. The *paraphernalia* of the wife—*i.e.*, her dress, jewels, and other strictly personal possessions—do not fall under the power of the husband. She may give them away without his consent,

and they cannot be attached by his creditors. (Ersk. i. 6, sec. 15 and 27; Stair, i. 4. 17; Bell, Prin. 1555.)

118. Articles of furniture, though belonging to the department of the domestic economy over which the wife may be supposed to preside more exclusively, such as tea-plate and linen, even though given to her before marriage, and marked with her initials, are not paraphernal. (Black v. Wood, Hume, p. 210.) A chest of drawers, on the other hand, in which the dress and ornaments of the wife were kept, was found to be paraphernal. (Pitcairn v. Peutherer, M. 5825.)

119. The character of paraphernalia may be communicated to articles not falling strictly under the above category, by being given by the husband to the wife, previous to marriage, on this express understanding. (Ersk. i. 6. 15, and 29.)

120. These articles would lose this character by his death, and might be attached by the creditors of a second husband. On the death of the wife, her paraphernalia descend to her own executors, in preference to her husband or his representatives. (Ersk. i. 6. 15.)

121. The wife may exercise *over her heritable property*, with the husband's consent, all the acts of administration competent to any other proprietor. She may sell, alienate, burden, or grant it in lease. She may also borrow money, and grant an heritable bond over it. But it is the husband alone who can uplift the rents and profits of the wife's estate, in all cases in which his marital powers are not expressly excluded or renounced. (Bell, Prin., sec. 1594.) As the property, however, continues in the wife, he cannot alienate it or burden it with debt, so as to affect it after his own decease, nor can he grant it in feu. (Kennedy v. Watson, Nov. 29, 1848.) He may grant a lease to last during his own life, but not longer. (Grieve, June 15, 1797, M. 5951.)

122. In treating of the powers of the husband, it is necessary to remark that a distinction exists between the *jus mariti* and

the right of administration, as the former may be excluded where the latter remains. (Fraser, i. 344, 416.) In this case, the fruits and annual returns from the property belong to the wife, and the application of them must be according to her direction; but she will not be able to sue for them without her husband's concurrence, or even perform the ordinary acts of administration, such as granting leases and removing tenants, without his consent. The exclusion of the *jus mariti* will, however, protect the property effectually against the diligence of the husband's creditors. (Dick v. Pinkhill, M. 5999.)

123. Where *both* the *jus mariti* and right of administration are excluded, the wife becomes the independent manager of all the property thus possessed by her. (Keggie v. Christie, 25th May 1815; Gowan v. Pursell, 17th May 1822; and 24 and 25 Vict., c. 86.) But it would be very unsafe to take a conveyance of heritage from a woman except in virtue of the powers conferred on her by 24 and 25 Vict., c. 86, as explained above, secs. 45, 49, 51 (9), without her husband's consent as her curator. (1 Stair, 4. 9; 1 Ersk. 6. 14; Bell, Prin., sec. 1562.)

124. Till the passing of the statute just referred to (24 and 25 Vict., c. 86), the marital powers of the husband were not affected by voluntary separation, or by the absence of the husband from Scotland; and it was doubted whether even judicial separation would entitle the wife to alienate or burden her property, or to exceed the limits of ordinary administration and management. (Baillie v. Letham, Elch. Annot., p. 12.)

125. "Where the husband," says Mr Erskine, "is, from fury or other disability, rendered incapable of interposing his consent as curator, the necessity of the case may support a deed granted by the wife alone, affecting her heritage, if it be rational." (Ersk. i. 27.)

126. In order to protect a deed by a married woman from challenge, on the ground that it was executed under the influence

of the force or fear of the husband, it must be ratified by an oath emitted by her, in his absence, before a judge. This duty is generally performed by a justice of the peace at his own residence. (*Ante*, secs. 47, 48.) The ratification, whether executed on a separate paper duly stamped, or indorsed on the deed, must be subscribed by the wife, or by two notaries when she cannot write. The attestation of the justice will not be sufficient. (*Gartshore v. Brand*, M. 6076.)

127. Where any doubt occurs as to the necessity of ratification, the safer course is to observe the ceremony, and the Court will sometimes authorize it, *ob majorem cautelam*. (*Brisbane*, March 1, 1850.)

128. This ratification does not bar the wife from challenging the deed on any other plea than force or fear, such as fraud (*Hay v. Cumming*, 28th June 1706, M. 16507); neither is the allegation that the force or fear proceeded from third parties excluded (*Ersk. i.* 635). See the converse case of *Buchan v. Risk*, Mar. 1, 1834, mentioned sec. 48, p. 13.

129. When the wife raises an action of separation or divorce, she will be entitled to a separate aliment from her husband during its discussion, and a sum for this purpose will be awarded by the Lord Ordinary. (*Borthwick v. Borthwick*, June 17, 1848.)

130. She will have no such claim, however, if she has a separate estate sufficient for her maintenance (*Macfarlane v. Macfarlane*, June 26, 1844); and, in any case, it is in the discretion of the Court to give or withhold the aliment, and to fix its amount according to the circumstances of each particular case.

#### IX.—*Separation—Judicial and Voluntary.*

131. The law considers conjugal adherence to be one of the most sacred duties arising from the married state; and, as a general rule, it may be stated, that the only case in which a judicial separation will be granted by a court of law in Scotland,

is that in which this duty can no longer be performed without danger either to life or character.

132. All the grounds for separation may thus be reduced to the two heads of *cruelty* and *adultery*.

133. Personal violence endangering life, reasonable apprehension of such violence, or anything analogous to personal violence, such as starving a wife, exposing her, injuring her health by continued unkindness, or the like, will be sufficient to authorize judicial separation. (*Evans v. Evans*, 1 Haggard, 69; *Paterson v. Russell*, H. of L., 9th August 1850; Bell, vii., p. 337.)

134. Threatening words must be of such a character as to show a settled purpose of acting on them, not mere expressions of passing anger.

135. A false imputation of lasciviousness, made by the husband against the wife publicly and perseveringly, was held by the Commissaries and the Court of Session to be a sufficient ground for judicial separation; but this decision the House of Lords reversed, after a three days' hearing. (*Leckie v. Moir*; Elch., *v. Husband and Wife*. No. 35 (1750).) The correctness of this decision, however, has been called in question by *obiter dicta* from the bench; and opinions have been indicated that a course of harsh and contumelious usage is *conceivable*, which, though unaccompanied by threatenings of personal violence, would be sufficient to warrant separation. On this point, the observations of Lord Brougham, in *Paterson v. Russell* (H. of L., 9th August 1850), are very important:—"If the husband, without any violence, or threat of violence, to his wife, without any maltreatment endangering life or health, were to exercise mere tyranny, constant insult, vituperation, scornful language, charges of gross offences, utterly groundless; charges of this kind made before her family, her children, her relations, her friends, her servants; insulting her in the face of the world, and of her own domestics; calling upon them to join in these

insults, and to treat her with contumely and with scorn ; if such a case were to be made out, or even short of such a case, any injurious treatment which would make the marriage state impossible to be endured, rendering life itself almost unbearable, then, I think, the probability is very high, that the Consistorial Courts of this country would relax the rigour of their negative rule." (P. 366.)

136. It is thus apparent that no ordinary austerity of temper, petulance of manner, rudeness of language, or even occasional passion, will be held as amounting to cruelty. Still less will the denial, however unreasonable, of indulgences, luxuries, and accommodations, be held as such ; for "the Court has no scale of sensibilities by which it can gauge the quantum of injury done and felt." (Evans v. Evans, 1 Hag., p. 38.)

137. Habitual intoxication on the husband's part, not accompanied by personal violence, will not be sufficient ; but turning the wife out of doors amounts to cruelty, and opens to her the remedy of judicial separation. Desertion for four years forms the ground of an action of divorce for desertion ; and it is not now necessary that such action should be preceded by an action of adherence. (24 and 25 Vict., c. 86, sec. 11.)

138. The husband is entitled to forbid the wife's friends from visiting her ; and he may confine her to the house, or at least direct her movements so as to prevent her from going to places and engaging in pursuits of which he disapproves. Though such prohibitions, in ordinary circumstances, would unquestionably amount to a harsh exercise of the marital authority, there may be causes to justify them, of the reasonableness of which a court cannot, and ought not to judge. (Fraser, i. 459.)

139. Crimes of an aggravated nature on the part of the husband, as being productive of personal danger to the wife both physical and moral, are just causes of awarding her the remedy of separation. (Brown, ii. 29. 10.)



140. The fact of either spouse having become diseased, however loathsome may be the character of the affection, will not have this effect, except in the single case where the disease is of such a character as of itself to afford *prima facie* evidence of adultery. (Fraser, i. 459; Popkins v. Popkins, 1 Hag. 765.)

141. Neither venereal disease, if contracted before marriage, nor impotency supervening from the effects of incontinence before marriage, nor the taint of hereditary madness if undeveloped, will be adequate grounds for separation. (Fraser, i. 459.) Even confirmed insanity, if supervening on marriage, is no ground for declaring it null; though the sane spouse will of course be entitled to resort to separation if necessary for his personal safety. This, however, must be done by the authority of a magistrate. (Belcher v. Belcher, Phillimore's Report, 6th June 1835. See Insanity.)

142. In actions of separation on the ground of cruelty, a renewal of intercourse after the acts alleged will not be held a *remissio injuriarum*, like the renewal of intercourse after knowledge of adultery in cases of divorce. (Macfarlane v. Macfarlane, Feb. 7, 1849.)

143. Adultery is a ground for separation, which may be chosen in preference to divorce, at the option of the injured party. (Letham v. Provan, 8th March 1823.)

144. Judicial separation is competent to both spouses; though, where cruelty is the ground on which it is sought by the husband, the facts must be somewhat different from those which would be sufficient to entitle the wife to the remedy. (Kirkman v. Kirkman, 1 Hag. 409.)

145. It has been held incompetent to pronounce judgment in an action of separation in favour of the pursuer, merely upon the admissions of the defender. (Muirhead v. Muirhead, May 28, 1846; and 1 Will. IV., c. 69, sec. 36.)

146. Judicial separation annihilates the marital power over

the wife's *person*. She may go where she chooses; and, consequently, the rule of law, that the husband's domicile is hers, no longer holds; and she must be cited as if she were unmarried. (Ersk. i. 6. 21; Fraser, i. 465. 6; Shand's Prac. i. 146. 7; *Alison v. Catley*, 15th June 1839.)

147. Except as regards the wife's separate aliment, and the property which she may hold independently of her husband, under the provisions of the Conjugal Rights Act (24 and 25 Vict., c. 86), judicial separation makes no change on the patrimonial relations of the spouses. (*Alison v. Catley*, 15th June 1839; Ferg. Cons. Law, p. 183.)

148. The custody of the children will be regulated by the Court, in the exercise of a sound discretion. Where the husband commits the wrong, they will, in the general case, be given to the wife till the girls be twelve and the boys seven years of age. (Lindsay, 6th March 1860, N. R.; Fraser, i. 466.)

149. The separation may be recalled by the same Court which granted it, on proof of the fact that the cause for which it was granted no longer exists. (Ib.)

150. It may also be recalled by mutual consent, which may be either express or implied. Thus, where a wife, having obtained a decree of separation, returned to the society of her husband before an aliment was modified to her, and lived with him for four years, it was found that a remission of the decree by implication had taken place. (*Winton v. Grieve*, 15th May 1830.)

151. *Lawburrows* is a remedy of which those spouses may avail themselves who are unwilling to proceed to so extreme a measure as separation, and who, notwithstanding, feel that they stand in need of the protection of the law. (Fraser, i. 272 and 497.)

152. There is this difference between this remedy as applied to husbands and wives, and to parties unconnected with each other, that whereas, in the latter case, it is enough if the party

injured swear that he dreads bodily harm, in the former, the petition must be served on the wrong-doer, and its whole averments supported by proof, before the prayer of the petition will be granted. (Taylor v. Taylor, 25th June 1829.)

153. *Voluntary separation* is the remedy adopted where the spouses live unhappily together, but where neither has acted towards the other in such a manner as to warrant judicial separation, or where, though such has been the case, they are unwilling to expose their failings in a court of law. (Ersk. i. 6. 80; Fraser, i. 468.)

154. By our ancient law, a contract of voluntary separation was regarded as null, on the ground that, being inconsistent with the duty of adherence incumbent on married pairs, it was *contra bonos mores*. This doctrine is still adhered to, to the extent of not enforcing such contracts with regard to future time, though they will be held as having regulated the rights of parties as regards the past.

155. The contract of separation narrates the intention of the parties to live separately, and sets forth the causes of separation. This latter is a point on which the injured party should carefully insist, so as to facilitate his obtaining a judicial separation should the voluntary contract be revoked. Either party may revoke the deed during marriage. (Fraser, i. 469.)

#### X.—*Donations between Husband and Wife.*

156. *Donations between man and wife*, by the law of Scotland, are not null; but they are revocable by the donor at any time of his or her life. The object of this rule, which, in a modified form, we borrowed from the Roman law at a very early period, is to prevent the spouses from despoiling themselves or their heirs from mutual affection. (Reg. Maj., lib. ii., c. 15, secs. 10, 11; Dig., lib. xxiv., tit. 1, sec. 1; Stair, i. 4. 18; Ersk., B. i., tit. vi., sec. 29.)

157. Though the bride has no power to execute deeds in favour of third parties, to the bridegroom's prejudice, donations between bride and bridegroom are irrevocable. (Fraser, i. 347 and 473.) Of such gifts Lord Fountainhall said, not without apparent reason, that "bonds granted *inter sponsum et sponsam in æstu amoris*, are more to be reputed donations, and more exorbitant than what are given after marriage, there being a greater eclipse of the use of reason at that time than afterwards." But the contrary has long been settled law. (Stair, i. 4. 18; Ersk. i. 6. 29; Fraser, i. 473.)

158. After the marriage is dissolved by divorce, there is no impediment to grants by either party to the other, and such donations would be irrevocable. (Dig. xxiv. 1. 35 and 64; Fraser, 472; Murray v. Livingston, Moo. 328.) But previous donations are held to be revoked by the divorce of the donee for adultery. (Ersk. i. 6. 31; Fraser, 497 and 692.)

159. If a deed between husband and wife do not contain the recital of an onerous cause of granting, it is presumed to be a donation. (Bell's Prin. 1616.) This presumption, however, may be redargued by contrary proof, and its only effect is in fixing the burden of proof upon the party against whom it bears. (Fraser, 478.)

160. The renunciation of the *jus mariti* without onerous cause is a donation which the husband will be entitled to revoke. (Ib. 479.)

161. A donation will be tacitly revoked by the donor doing anything which is plainly inconsistent with its continuance in the hands of the donee; but revocation will not be inferred from a voluntary, or even a judicial separation, between the spouses. (Ib. 498.)

162. The predecease of the donee does not effect a revocation of the gift, which passes to his heir; but no length of enjoyment by the heir will, in the case of heritage, deprive the donor of his

right of revocation. (Fraser, i. 497.) A third party acquiring from the donee by a singular and onerous title, would be protected from revocation.

163. A general conveyance of property does not infer a tacit revocation. (Ib. 496.)

### XI.—*Dissolution of Marriage.*

164. Marriage is dissolved in two ways: by *death* and by *divorce*.

#### 1. *Death.*

165. Where the marriage is dissolved by the death of either of the spouses, the other is at liberty to marry again immediately; there being no "year of grief" imposed on the widow by the law of Scotland, as there was by the law of Rome. (Dig. iii. 2. 1; Code, 5. 9. 1 and 3; Lord Mackenzie, in *M'Grigor v. M'Grigor's Trustees*, March 2, 1839, F. C.)

166. If the widow is pregnant, or affects to be so, in circumstances such as to give rise to a reasonable suspicion that a supposititious heir is about to be palmed off as the issue of the deceased husband, it is said that a medical examination will be ordered on application to the Court of Session. (*Ross v. Gray*, M. 16455 (1699); and other authorities cited by Fraser, ii., p. 1, 2.)

167. The widow is entitled to aliment from the husband's representatives till the first term of Martinmas or Whitsunday after his death. The principle of this rule is, that the law holds the husband's domestic establishment not to be broken up till the term following his death, and the wife receives aliment on what may be regarded as a fiction of his continued existence.

168. The widow's mournings are included in the provision to which she is thus entitled, and being part of her husband's funeral expenses, they form a preferable debt on his funds. (*Sheddan v. Gibson*, May 15, 1802.)

169. The claim for aliment on the part of the widow does not possess a preference over the claims of the husband's creditors, and it is doubtful how far it can compete with them. (Fraser, i. 523; *Buchanan v. Ferrier*, 14th Feb. 1822. *Infra*, sec. 191.)

170. It will not be invalidated by the fact that the wife possesses separate property of her own. (Ib.)

171. It was till recently the rule in Scotland, that if the marriage were dissolved within year and day, without the birth of a living child, it should not be regarded as a completed contract, and that the parties should stand, as regarded their interests in each other's estates, on the same footing in all respects as if no marriage had ever taken place. We have already mentioned (*ante*, p. 21), that, in so far as moveable property is concerned, this rule has been altered by a recent statute. Though the subject is not free from doubt, there seems reason to believe that the 7th sec. of the statute referred to (18 and 19 Vict., c. 23) is general in its application, and consequently that the old law is altered as to heritage also.

172. The surviving spouse is entitled to certain provisions both from the heritable and moveable property of the predeceaser.

173. *Terce* is a liferent accruing to the widow in one-third of the heritage in which the husband died infeft. (Ersk. ii., tit. ix.; Reg. Maj., lib. ii., c. 16, sec. 5.) It corresponds to the English *dower*, and, like it, is of "reverend antiquity." (See the history of *terce* well given in Fraser, i. 602. It originated in a Teutonic, not a Roman custom.)

174. If a special provision has been granted to the wife, either by ante-nuptial or post-nuptial settlement, or by any other deed, the *terce* will be held to be tacitly excluded unless the deed contains an express reservation of it. (Bell's Prin., sec. 1957.)

175. Lesser *terce* is that which is due out of lands still burdened with *terce* to the widow of a former proprietor. It is, therefore, one-third of the remaining two-thirds. (Stair, ii. 6. 16 ;

Ersk. ii. 9. 47; Reg. Maj. ii. 16. 64.) On the death of the former tercer, it extends to a complete third of the whole lands.

176. The terce is diminished by all real burdens completed by infeftment before the husband's death. The mansion-house, unless let (Bell's Prin., sec. 1598), has also been excluded by custom from the terce (Fraser, i. 617 and 8).

177. Terce is said to be due where the death of the husband is merely civil, and also if the marriage is dissolved by divorce either for adultery or desertion by the husband. (Fraser, i. 605.)

178. No terce is due from superiorities, mines and minerals, or patronages. (Ib. i. 620. 621.) And the same rule applied to property held by burgage tenure till the passing of 24 and 25 Vict., c. 86, sec. 12.

179. If the view of 18 and 19 Vict., c. 25, stated sec. 170, be correct, terce will be due to the widow under that statute, even though the marriage be dissolved within year and day, and without the birth of a living child.

180. *Courtesy*, or, *the courtesy of Scotland*, as it is called, though it exists in England, and is now traced to a continental origin (see the Coutume of Normandy, quoted from Barnage, vol. ii., p. 60, by Fraser, i. 636), is a liferent corresponding to the widow's terce, which accrues to the husband on the death of the wife; but differing from terce in this, that it extends to the *whole* of the heritable property in which she died infeft.

181. The right to courtesy does not emerge unless a living child has been born of the marriage, however long it may have endured. This child must further be the mother's heir; so that, if there be a child by a former marriage who is the mother's heir, courtesy will not be due to the second husband. (Ersk. ii. 9. 53.) Should this child die before he has made up his titles, and thereby vested his mother's estate in his person, courtesy will be due to the second husband, provided the second marriage has produced an heir. (Fraser, i. 639.) It is thus rather as

the father of an heir, than as the widower of an heiress, that courtesy is due to the surviving husband. But it is not necessary that the child should survive. If it has once lived, and *been heard to cry* (Robertson *v.* Moderator of General Assembly, Jan. 22, 1833), that is sufficient to confer the right. (Ersk. ii. 9. 52, *et seq.*; Bell's Prin. 1606.)

182. If the child was born before the marriage of the parents, but legitimated by their marriage subsequently, the husband will be entitled to courtesy, though the wife die immediately after marriage. (Fraser, i. 638.)

183. Courtesy extends to all heritage to which the wife succeeds, whether as heir of line, tailzie, or provision, and whether before the marriage or during its subsistence. (Ib. 639.)

184. It does not extend to heritage acquired by purchase, donation, or other singular title,—*i. e.*, to what in Scotland is called conquest. (Ersk. ii. 9. 54; Hailes, p. 878.)

185. As the wife's representative, the husband, whilst possessed of the liferent of her heritage, is liable for all annual burdens affecting it, and also for the current interest of her personal debts, at least in so far as he is enriched by the courtesy. For such personal debts as he may thus pay he will have recourse against the wife's executors, or her heirs succeeding to property which does not fall under the courtesy. (Ersk. ii. 9. 55.)

186. Courtesy vests in the husband without service or any other legal form. (Bell's Prin., sec. 1608.)

187. The claim to courtesy is barred by an express discharge by the husband (Hamilton *v.* Boswal; Rob. Appeals, p. 346); but, unlike terce, it is not tacitly excluded by a conventional provision not declared to be in lieu of it (Primrose *v.* Crawford, M. App.; Fraser, i. 642; Bell's Com. i. 632).

188. *Jus relictæ* may be regarded either as the wife's share, or as a claim on the moveable property of the spouses emerging to



her on the death of the husband. (As to the origin of the *jus relictæ*, and its relation to the *communio*, see Fraser, i. 338, *et seq.*)

189. If there be children of the husband, either by his last or by any former marriage, a tripartite division of the moveable property of the spouses takes place: one-third falls to the children as *legitim* (*legitima pars liberorum*); one-third, which is at the husband's disposal, and which, failing his destination, goes to his children as executors, is called "dead's part;" and the remaining third accrues to the widow as *jus relictæ*.

190. Where there are no children, the moveable property is divided into two equal parts, one of which is dead's part, and the other *jus relictæ*.

191. The wife's claim to *jus relictæ* will not be taken away by a conventional provision unless it be expressly renounced. (Bell's Prin. 1581 and 1591. How renounced or discharged; see Fraser, i. 590.)

192. The husband cannot affect the *jus relictæ* by any testamentary or other deed (Bell's Prin., sec. 1591), although he may diminish its amount indirectly during the marriage by his manner of administering the joint property of the spouses. (Ersk. iii. 9.16.)

193. Personal bonds bearing interest, though moveable in most respects, are excluded from the *jus relictæ*. (Stat. 1661, c. 32.)

194. The *jus relictæ* does not entitle the wife to compete with the husband's creditors, or to rank on his bankrupt estate. (Fraser, i. 340. 536; *ante*, 168.)

195. The *jus relictæ* not being regarded as a succession, vests in the wife without confirmation; and on this ground, as well as from its falling under the category of "legacies, annuities, and residues," bequeathed by one spouse to another, pays no legacy duty. (Ib. 590; Bell's Dic., Directions by Solicitor of Legacy Duties.)

196. Though the wife should have children by a former marriage, the division will still be simply into two equal parts, they having already shared in the estate of their own father. Where the husband leaves children by a former marriage, on the other hand, it becomes tripartite.

197. The claim to *jus relictæ* is not now invalidated by the dissolution of the marriage within year and day. (18 Vict., c. 23.)

198. *Where the wife shall predecease the husband*, it is provided, by the statute just referred to, that "the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy or bequest, or testamentary disposition thereof, by such wife, affect or attach to the said goods or any portion thereof." (Sec. 6.) The wife's power of testing, and the claims of her executors, should she die intestate, are thus confined to her separate estate.

199. But the principle of representation in moveable succession, introduced by this statute, does not apply to the *jus relictæ*, its operation being restricted by the interpretation clause (sec. 9) to intestate succession to property of which the deceased might have disposed by will.

200. When a wife is separated from her husband, and an interlocutor of protection has been pronounced in her favour, in terms of the recent Conjugal Rights Act (24 and 25 Vict., c. 86, sec. 1), or where she has obtained a decree of separation *a mensa et thoro*, all property which she may acquire, or which may come to devolve upon her, shall be held as property belonging to her, independent of the *jus mariti* and husband's power of administration, and such property may be disposed of by her in all respects as if she were unmarried; and on her decease the same shall, in case she shall die intestate, pass to her heirs and representatives, in like manner as if her husband had been then dead (sec. 6).

201. *Legitim*, or the claim accruing to the children on the

moveable estate of the parents, will be considered under the head of Parent and Child.

## 2. Divorce.

202. There are two grounds only on which the law of Scotland will sanction the disruption of the matrimonial tie: adultery, and malicious desertion. (As to the history of the law of divorce in Scotland, see Fraser, i. 644, *et seq.*; and note to Brodie's Stair, B. i., tit. iv., p. 25, *et seq.*) .

203. In thus limiting its interference to cases of absolute necessity, where it does little more than provide for the consequences of a fact which is already accomplished, our law seems to have struck a happy medium between the laxity which at one time disgraced the Christian world, and the over-stringent provisions of the Canon Law.

204. The Scottish law of divorce is, moreover, in accordance with that which prevails in almost all the Protestant countries of Europe, England being now scarcely excepted. "The conjugal relation," says Mr Fraser, "has stood not less, but infinitely more secure and sacred, since separations *a mensa et thoro* for adultery, which were extremely common under the Popish jurisdiction, fell into total disuse; and the number of actions for divorce *a vinculo* has, in proportion to that of the population, remained nearly the same at all periods since the commissaries were first appointed in 1563, down to the present time." (Ib. i. 656.)

## Adultery.

205. Divorce for adultery was not introduced into Scotland by statute; but immediately after the Reformation it was held by the courts, as a consequence of that event, to be the common law. (Stair, i. 4. 7; Ersk. i. 6. 87.)

206. Divorce is equally competent in Scotland, whether the crime of adultery has been committed by the husband or the wife.

207. It is not adultery if one spouse (say the wife) has been constrained by force to suffer connection with another than her husband; or if the intercourse has taken place by mistake, she believing the person to be her husband. (Fraser, i. 657; Thomson v. Bullock, Dec. 9, 1839, F. C.; and M'Donald, 5th May 1842, Brown's Just. Rep.)

208. Neither is it adultery if, acting on a belief in his death, founded on false intelligence, or other reasonable grounds, she have married another. (Ib.)

209. The action is competent only to the aggrieved spouse. It is not competent to his or her heir or creditor, though they, or any other parties interested in the defender of an action of divorce, may competently state defences. (Ib.)

210. The Conjugal Rights Act of 1861 (24 and 25 Vict., c. 86) provides (sec. 7), that in every action of divorce at the instance of the husband it shall be competent to cite, as a co-defender along with the wife, the person with whom she is alleged to have committed adultery; and it shall be lawful for the court to decern against the person with whom the wife is proved to have committed adultery for the payment of the expenses of the process. It is, moreover, provided that it shall be competent to examine the alleged paramour as a witness, notwithstanding his being a co-defender in the cause; and in the power of the court to dismiss the action against him, if in their opinion such a course is conducive to justice. The subsequent section (8) provides that the Lord Advocate may enter appearance in all actions of nullity of marriage and divorce, either at his own instance or at the suggestion of the court.

211. If the Scotch courts have jurisdiction over the defender, divorce will be granted, though the adultery was committed abroad, and though he be absent from the country at the time of raising the action. (Fraser, 658.) In this case it is required by 24 and 25 Vict., c. 86, sec. 10, that the summons shall be served

upon the defender personally, unless it can be shown that he cannot be found, in which case edictal citation shall be sufficient.

212. Divorce can be granted only by the Court of Session; and residence for forty days in Scotland will render the defender amenable to the jurisdiction of that court. It has been decided, however, that such a domicile of jurisdiction, as it is called, acquired by the husband, does not change that of the wife to Scotland; and, consequently, that she cannot be sued in an action of divorce, unless she herself has been personally resident in Scotland for forty days. (*Ringer v. Churchill*, Jan. 15, 1840.)

213. The pursuer must also have resided forty days, in all cases in which he has no other connection with Scotland. (*Shields v. Shields*, Dec. 1, 1852.) It may be remarked, that actions of divorce which are brought into the Scotch courts by foreigners, and apparently for no other reason than to avoid the jurisdiction of the courts of a country in which this remedy is less easily obtained, are regarded by the judges with great suspicion. No case has occurred in which there has not been a longer residence than forty days on the part either of the pursuer or the defender; and should such a case be presented to them, though it is difficult to see on what principle they could dismiss it, there is no doubt that the courts would deal with it very reluctantly.

214. In order to prevent spouses who have become tired of each other's society from entering into a private compact to obtain a decree of divorce, the pursuer is called upon to swear that the action is not collusively raised; and the Lord Advocate may now appear for the public interest (24 and 25 Vict., c. 86, sec. 8).

215. *The oath of calumny* is to the effect, that the pursuer has just cause to insist in the present action; that he believes the defender to have been guilty of adultery; and that the facts stated in the condescendence (which is read to him at the time) are true; that there has been no concert or collusion between him and the defender in raising the action; nor does he know,

believe, or suspect that there has been any concert or agreement between any other person and the defender, on his behalf. Fraser, ii. 644, appendix.)

216. It has not been found practicable to lay down any rule as to what shall amount to collusion; and it is therefore to be feared, notwithstanding the stringency of the oath, that a secret understanding between the parties is not uncommon. It may be stated, on the one hand, that simple knowledge, on the part of the pursuer, that the defender wished him to succeed in his action, would not be collusion; whilst, on the other, an agreement that the husband, say, should commit adultery, in order that the divorce might be obtained, certainly would. (*Paul v. Laings*, March 7, 1855; *Dickson on Evidence*, p. 779.)

217. In *proof of adultery*, the first fact to be established is marriage; for where there was no marriage there can be no adultery.

218. *Presumptive evidence of adultery* is admitted as sufficient, because that fact is one which, less than almost any other, admits of being established directly; and unless it were competent to arrive at it by a train of circumstances, no protection whatever could be given to marital rights. (Fraser, i. 659.) The rule, however, is one which will be applied with great caution.

219. It is impossible to indicate universally what circumstances will warrant the conclusion that adultery has been committed, because, as Lord Stowell has remarked, "they may be infinitely diversified by the situation and character of the parties, by the state of general manners, and by many other incidental circumstances, apparently slight and delicate in themselves, but which may have most important bearings on the particular case. The only general rule that can be laid down is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion." (*Loveden v. Loveden*, 2 Hag., p. 23; see also *Burgess v. Burgess*, ib., p. 226.)

220. Divorce will not be granted where the injured party has connived at the crime of adultery. This plea has never been put forward in Scotland in bar of an action of divorce, except by the wife. But in England it is competent to the husband (*Turton v. Turton*, 3 Hag. 338), and probably would be held to be so in Scotland also, if a case similar to the well-known scriptural one (Genesis xvi. 2) were to occur. It arises where the husband becomes the instrument of his own dishonour, by conniving at his wife's adultery, or inciting her, directly or indirectly, to the commission of the crime. (Ersk. i. 6. 46.)

221. Again, if the party injured has been reconciled to the offender, he is held to have passed from his right to rescind the marriage contract, and his right to divorce is barred. (Ib. 43.)

222. The most pregnant circumstance in proving remission is always the voluntary continuance of matrimonial intercourse after the knowledge of the adultery.

223. *Recrimination* is no bar to divorce in Scotland, though mutual guilt may affect the patrimonial consequences of the dissolution of the marriage. (Ersk. i. 6. 45, and note; Bell's Prin. 1535.

224. *Long delay* may raise a presumption that remission of the injury has taken place; but it is not in itself a bar to an action of divorce. (Bell's Prin. 1533; *Mortimer v. Mortimer*, 2 Hag. 313; Fraser, i. 673.

225. Desertion, cruelty, the neglect of conjugal duties, or the denial of conjugal rights on the part of one spouse, will not justify adultery in the other, or bar the action of divorce.

#### *Malicious Desertion.*

226. Apostolic sanction has been claimed for divorce on the ground of desertion. (1 Cor. vii. 10, 11, 15; Stair, i. 4. 8.) As now recognised in this country, it is grounded on a statute

(1573, c. 55), in which it is spoken of as resulting from the doctrines of the Reformation. It is recognised in all the Protestant countries of Europe except England, in America, and in those of our colonies in which the law has not been derived from that of England.

227. The first step towards obtaining a divorce, on the ground of desertion, till very recently, was to raise an action of adherence. The pursuer having proved both the marriage and the desertion, decree of adherence was granted; the church, (*i.e.*, the presbytery, as coming in place of the bishop) was then called upon to admonish, and, if necessary, to excommunicate, the offender—a duty which it invariably declined. If these warnings were disregarded, an action of divorce, reciting the procedure in the action of adherence and before the presbytery, was then pursued in the Court of Session.

228. All this has now become matter of history, the Conjugal Rights Act of 1861 (24 and 25 Vict., c. 86, sec. 11) having declared it to be no longer necessary, prior to any action of divorce, to institute against the defender any action of adherence, nor to charge the defender to adhere to the pursuer, nor to denounce the defender, nor to apply to the presbytery of the bounds, or any other judicature, to admonish the defender to adhere.

229. Desertion must be malicious; and in the case of a defender who remains abroad, it will be necessary to prove that he does so with a deliberate purpose of abandoning his conjugal duties, and that he is not detained by the exigencies of the public service, or of his own private affairs. (Ersk. i. 6. 44; *Walker v. Walker*, 7th Dec. 1844; *Duke v. Duke*, 1st March 1845.)

230. It was long doubted whether malice could be presumed, to the effect of allowing an action of divorce to proceed, without personal service and intimation to the defender. The point was



rendered of much practical importance by the fact that the residence of the defender, in such cases, is very frequently unknown; and had such intimation been required, the injured party (usually the wife) would have been deprived of her legal remedy. It is now provided by 24 and 25 Vict., c. 86, sec. 10, that, "in every consistorial action the summons shall be served upon the defender personally, when he is not resident within Scotland; provided always, that if it be shown to the satisfaction of the Court that the defender cannot be found, edictal citation shall be deemed sufficient." But where the citation is edictal, the children of the marriage, if there be any, and one or more of the next of kin, must be called.

231. Where the husband has acquired a foreign domicile, it is incompetent for him to sue for a divorce in Scotland (*Bennie v. Bennie*, June 30, 1849), on the ground of adultery committed abroad. If the adultery has been committed in Scotland the reverse will be the case. (*Shields v. Shields*, Dec. 1, 1852.)

232. Any ground which would have justified a demand for judicial separation, will be a good defence against an action of adherence; *e.g.*, cruelty on the part of the pursuer, that he committed adultery, and the like. (*Vide supra*, p. 33.)

233. It would be a valid defence against an action of adherence or of divorce on the ground of desertion, in which the wife was pursuer, that the husband had required her to accompany him abroad, and she had refused; because she is bound to follow him throughout the world. (*Stair*, i. 4. 8; *Ringer v. Churchill*, Jan. 15, 1840; but see *Reid v. Reid*, 10th July 1823; *Fraser*, p. 447 and 486.)

## XII.—*Effects of Divorce.*

234. Divorce being a complete disruption of the marriage tie, both parties are at liberty to marry again. To this rule there is one statutory exception. By 1600, c. 20, the offending spouse

and the paramour are not permitted to marry ; but this statute is generally supposed to be in desuetude (Bell's Dic., Ross' edit.), though Mr Fraser contends for the opposite view (Fraser, i. 84); and it is not unusual to omit the name of the paramour in the decree of divorce, for the purpose of evading the Act.

235. Where divorce has followed on the ground of desertion, it has been determined by the statute (1573, c. 55), as interpreted by Lord Stair, that "the party injurer loseth all benefit accruing through the marriage ; but the party injured hath the same benefit as by the other's natural death." (Stair, i. 4. 20.)

236. If the husband be the guilty party, he is thus obliged not only to restore the tocher (dos), but he forfeits such conventional provisions as may have been made by the marriage contract (see Marriage Contract, p. 52) in his favour, together with his rights of courtesy and *jus mariti*. Should the wife, on the other hand, be guilty, she has no claim for the restitution of the tocher, nor for terce or *jus relictæ*, nor for any conventional provision in her favour by marriage contract. (Ersk. i. 6. 46.)

237. The innocent party in either case continues to be entitled to the legal provisions. The wife may claim her terce and *jus relictæ*, unless they are excluded by her contract of marriage, and the husband's right to courtesy emerges just as if she were dead. (Fraser, i. 686.)

238. The death of the defender before decree of divorce has been pronounced bars these consequences ; but where the pursuer dies, it is doubtful whether an action of divorce may not be taken up by his heir. (Ib. i. 658 and 692.)

239. Divorce for adultery not having been introduced by legislative enactment, like divorce for desertion, but having its origin in the common law, its effects on the patrimonial interests of the parties can only be ascertained from the decisions of the Court. These have established the same general rule as that received in the case of divorce for desertion.

240. To this there would appear to be one exception. The tocher, which must be restored by the husband who has deserted his wife, may be retained by him who has committed adultery. (*Justice v. Murray*, M. 334 ; *Fraser*, i. 687 and 691 ; and authorities cited.) The grounds of this distinction are not apparent.

241. Donations by the innocent to the guilty spouse are revoked by divorce ; those by the guilty to the innocent become irrevocable. (*Ersk.* i. 6. 46.)

### XIII.—*Declarator of Nullity of Marriage.*

242. A marriage, however celebrated, may be declared by the Court of Session to have been no marriage at all, if it be proved that any of the impediments to marriage above enumerated (*ante*, p. 10, *et seq.*) existed at the time when it was attempted to be contracted. (*Ersk.* i. 4. 7.)

243. Unlike actions of divorce, actions of nullity of marriage, on any other ground than impotency, may be instituted, not only by either of the parties to the alleged contract, but by any one having a patrimonial interest in setting it aside. (*Bell's Prin.* sec. 1524.)

244. Along with the conclusion for nullity, a conclusion for damages is sometimes inserted against the party, who, knowing of the impediment to the marriage, yet entrapped the other into the connection. Damages in such a case are generally high, on account of the peculiar aggravation of the wrong. (*Fraser*, i. 82. 86. 7.)

### XIV.—*Consistorial Actions.*

245. *Consistorial actions*—i.e., declarators of marriage, nullity of marriage, declarators of legitimacy and bastardy, actions of divorce and separation—must now be brought before the Court of Session.

246. No decree can be pronounced in any of these actions in

absence of the defender, or even on his admission, unless substantiated by other evidence. (11 Geo. IV. and 1 Will. IV., c. 69, sec. 36; *Muirhead v. Muirhead*, May 28, 1846.) The reason of this rule is the extreme importance to society of the true status of its members being positively ascertained. But actions of aliment between husband and wife are to be deemed summary causes both in the Outer and in the Inner House; and when no appearance is entered for the defender, decret shall be pronounced in absence, without proof, as in other cases before the Court of Session. (24 and 25 Vict., c. 86, sec. 15.)

247. In actions for separation and divorce, the Court may make interim orders without respect to children. (Ib. sec. 9.) By the same enactment (sec. 13) it is provided that the Lord Ordinary shall take proofs in consistorial actions in place of Sheriffs Commissary, to whom compensation is granted.

#### XV.—*Marriage Contracts.*

248. Having considered the rights and obligations of married parties which spring from the common or the statute law, it is proper to treat of the class of deeds by which these provisions may be altered to suit the views of the parties, or the circumstances of the particular case.

249. The various rights which may require to be adjusted, and the many contingencies against which provision may have to be made, render the subject one of great intricacy, which can here be treated only in the most general manner.

250. It is competent for the parties to a marriage to make any conditions with each other which are not inconsistent with the conjugal relation, or in violation of morality or of public law.

251. Marriage contracts differ very essentially in their effects, according to whether they are entered into before or after marriage.

252. In *ante-nuptial* contracts, the stipulations are conditions

of the marriage: hence they are onerous,—effectual not only against the parties themselves, but against creditors.

253. By *post-nuptial* contracts, again, no alterations to the prejudice of creditors, and in favour of the wife and children, can be made, because the interests of the latter have already been identified with those of the husband and father. Even the right to their legal share of their father's property, which arises to the children by the unconditional marriage of their parents, is independent of such contracts. (Stair, ii. 3. 41, 5. 19, 6 *passim*, 8. 45; Ersk. i. 6, iii. 3. 30, 8. 38; Bell's Prin. 1941.)

254. Two highly inconvenient provisions of the common law, by which some species of conventional arrangement was rendered almost a matter of necessity, have been removed by the recent Moveable Succession Act. It is now no longer necessary to stipulate that, where the wife shall predecease her husband, her representatives shall not be entitled to carry off a share of the goods in communion, even in the case in which these goods belonged originally to the husband, nor that a marriage dissolved within year and day shall have the same patrimonial effects as if it had subsisted for a longer period. (18 Vict., c. 23, secs. 6 and 7.)

255. The main object of a marriage contract is to provide against the consequences of the misfortune or imprudence of the husband, by placing in the hands of trustees, or otherwise setting apart, a separate estate or fund for the wife. This may be done either with the rents of heritable property, or with moveables; and the arrangement may proceed either from a third party conveying to the wife, under the provision that the husband's interest shall be excluded, or it may be made before marriage by the wife herself with her own funds, or by the husband with his funds.

256. In general such conventional arrangements must be made expressly; and unless the *jus relictæ* is excluded in words,

the wife will continue to be entitled to it, notwithstanding any stipulations that may have been made in her favour. (Ersk. iii. 9. 16, and 25 ; Howden v. Crichton, 18th May 1821 ; Fraser v. Rankin, 17th Dec. 1835.) But as regards *terce* the reverse is declared to be the case by statute. (1681, c. 9.) Even after marriage, if the husband be solvent at the time, he may set apart a separate fund, of "reasonable amount," for the support of his wife. (Fraser, i. 829.)

257. Provision may also be made for children in this manner. If the term of payment be during the father's life, or on the occurrence of an event which may happen during his life, such as majority or marriage, the children are entitled to a preference if their provisions have been secured by *infestment*, and to rank as creditors if they have only a personal obligation for them ; but if the provision be payable after the father's death, it only gives a *spes successionis*, and does not found a right to rank as creditors. These provisions, like those for the wife, must be reasonable in the circumstances of the parties. (Fraser, i. 830 ; Jeffrey v. Campbell, 24th May 1825.)

258. It is not unusual, where there is heritable property, to appropriate certain lands to the wife in *liferent*, along with a jointure-house ; and these provisions, called a *locality*, if accepted by her, will be held to come in lieu of *terce* ; but no express provision made for the husband will exclude the courtesy unless it be specially renounced. (Bell's Prin. 1948.)

259. In place of having certain specific lands set apart to her, the wife is very commonly secured in an annuity by *infestment*. This provision is called a *jointure*. (Bell's Prin. 1947.)

260. Another very usual provision in marriage contracts is, that certain lands shall be held by the husband and wife in *conjunct fee and liferent*. If the alternate destination be to the heirs of their body, or *their heirs* simply, the husband is in general the sole *fiar*. In this case his heirs succeed, and the right may be

attached by his creditors, but subject in either case to the wife's liferent. The construction of such clauses, which ought to be framed with the greatest care, will often be affected by the fact of the property having come from the wife originally, and its having come in the form of tocher or otherwise, and by various other considerations. (Fraser, i. 802, *et seq.*)

261. It is by marriage contracts, also, that conjunct rights in parents and children are usually constituted. The general rule in these cases is, that where the right is taken to the father in liferent, and to the children that may be born of the marriage in fee, the father is fiar, the children having merely a right of succession, which is defeasible by the father's creditors. But if the right be to the father "for his liferent use *allenary*," and to his children, even though the contract be ante-nuptial and the children unborn, the father's right will be limited to a fiduciary fee for the children's behoof, and will not be affected by the father's debts. (Bell's Prin. 1956; Fraser, i. 810.)

262. Where the destination is to "husband and wife in conjunct fee and liferent, and children in fee," the meaning is, that the spouses shall each have a joint liferent and a *possible fee* while they both live, it being uncertain which will survive. (Ersk. iii. 3. 30, and 8. 38; Fraser, i. 804, *et seq.*)

## CHAPTER II.

### OF PARENT AND CHILD.

#### I.—*Legitimacy.*

263. Legitimacy is the personal status which results from birth in lawful wedlock.

264. But though this is the usual, it is not the exclusive

ground on which legitimacy is secured. From views of expediency, public policy, and humanity, all the legal privileges of the status are extended to certain cases where no marriage was entered into. (Sec. 266, *et seq.*)

265. The case of a posthumous child can scarcely be regarded as an exception to the general rule; for he, at all events, was conceived in wedlock.

266. If a child be born beyond ten months after the marriage is dissolved, he will scarcely be legitimate. Neither will the rule, that "he is the father whom the marriage points out," necessarily decide the case in which a child is born within six months after the marriage is contracted, though it will lay the onus of proof on the party who impugns the legitimacy. But unless the paternity is impossible or disproved, the child, as in the case of bastards, will be legitimated by the subsequent marriage of his presumed parents. (Fraser, ii. 2.)

267. The presumption in favour of legitimacy which is raised by the marriage, will be invalidated by proof of physical impossibility, whether grounded on the impotency or the absence of the reputed father. Very strong evidence to the effect that no sexual intercourse took place between the husband and wife, will have the same effect, even where it does not amount to proof of impossibility. (5 Clark and Finn. 229; Nicolas on Bastardy, 181; *Sandy v. Sandy*, 4th July 1823; Fraser, ii. 2. 3.)

268. *The period of possible gestation*, though of extreme importance both in questions as to legitimacy and as to the paternity of bastard children, is so much disputed amongst medical men, that the courts have been unable to determine it with any degree of accuracy. It is generally admitted that the ordinary period is ten lunar months, forty weeks, or 280 days (equal to nine calendar months and a week); and the presumption will tend to become adverse to the alleged legitimacy or paternity, in proportion to the extent to which the period assigned for the gesta-



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in cases of legitimation by subsequent marriage. During the celebration of the marriage the children were placed under their mother's cloak, from which they emerged legitimated at its conclusion. (Fraser, ii. 18.)

275. Legitimation by subsequent marriage confers all the legal rights attaching to legitimate birth, and enables the child to take under a destination to lawful children. (Ersk. i. 6. 52 ; Bell's Prin. sec. 1627.)

276. An important question remains open, as to the rights of children legitimated, *per subsequens matrimonium*, in competition with those of legitimate children born of a marriage intermediate between the birth and legitimation of the others. (Fraser, ii. sec. 18.)

277. *Legitimation by letters from the sovereign*, in imitation of the power exercised first by the Roman emperors, and subsequently by the popes, though not unknown to the law of Scotland, is very limited in its effects. It will not entitle the bastard to succeed to a relative dying intestate ; but it confers on those who would have been his heirs-at-law, had he been legitimate, the right to succeed him, which, failing lawful children, would have fallen to the sovereign himself. In granting legitimation to this extent, the sovereign thus only resigns his own right, without interfering with the rights of third parties. (Ersk. iii. 10. 7.)

278. Formerly bastards could not test ; and the letters of legitimation consequently contained a clause conferring this power upon them. The statute 6 Will. IV., cap. 22, removed this inability.

279. Many international questions of great nicety, into which we cannot here enter, have arisen out of our recognition of legitimation by subsequent marriage, and its rejection by our English neighbours, and by those states in America that have followed the English law.

280. The regulating fact is the domicile of the father ; but whether his domicile at the period of the marriage or of the birth of the child is to prevail, supposing them to conflict, is still an undecided point. (Fraser, ii. 24, and 1 Burge Com. 104.)

281. In the case of real property, the law of the country in which it is situated prevails. Thus it has been held, that a child legitimated *per subsequens matrimonium* in Scotland, cannot succeed to lands in England. (Birtwhistle v. Vardill, 2 Clark and Finn. 571 ; and 7 Clark and Finn. 895.)

## II.—*The Paternal Power.*

282. The power of the father over the child is recognised, to a greater or less extent, by all systems of jurisprudence ; and is generally greatest in the rudest conditions of society. Authorities differ as to the period at which, by the law of Scotland, the child passes entirely beyond the control of the father. In so far as the person is concerned, his power of constraint probably ceases at the legal age of puberty, both in males and females. (Stair, i. 5. 13 ; Fraser, ii. 27 ; see Tutor, *infra*.)

283. The father is entitled to the custody of the child, and may remove it from place to place, and from one country to another. He can recover its person from any one who detains it, and, after infancy at all events, even from the mother. (Fraser, ii. 28.)

284. The father has the power of inflicting moderate chastisement ; and he may lawfully compel the child to labour, when able to do so, for the subsistence of the family. (Ersk. i. 6. 53 ; Borthwick, Dec. 20, 1845.)

285. The powers of the father do not terminate with divorce, probably not even where he is the guilty party. (Fraser, ii. 29 ; but see Harvey v. Harvey, June 15, 1860.)

286. In the case of a daughter, the father's power, both as regards person and property, terminates with marriage, as she

thereby passes under the authority of her husband. (Ersk. i. 6. 56.)

287. The power of the father may be controlled by the Court of Session, as the supreme court of equity in this country ; but a strong case will require to be made out that it is vicious and immoral, or cruel and oppressive. (Harvey, June 15, 1860.)

288. Refusal to aliment or educate his children might amount to such a dereliction of paternal duty as to be regarded by the Court as involving a forfeiture of paternal power. The case of a father in this respect, however, differs essentially from that of tutors, where the Court will compel them to educate the pupil in a manner suitable to the rank, status, and property he will enjoy on arriving at manhood. (Fraser, ii. 33.) Of the proper amount of education beyond what may be necessary to enable the child to obtain a subsistence, the father is the absolute judge ; and it is doubtful if he can be compelled to apprentice his child to a trade, or make him acquainted with any kind of skilled labour.

289. None of the powers of the father belong to the mother in the case of legitimate children ; but she will be preferred to the custody of illegitimate children under seven years if males, and ten if females. (Smith's Digest of the Poor Law, p. 136.) An offer by the father of an illegitimate child, seven years of age, to bring it up in his own family, is an answer to a demand for aliment by its mother. (Corrie v. Adair, Feb. 24, 1860 ; Harvey, June 15, 1860.)

### III.—*Duty of the Father to Aliment the Child.*

290. So decidedly do the laws of this country recognise the obligation which nature has laid on the father to aliment the family which he has gathered around him, that refusal to comply with it—if either wife or child shall, in consequence, become chargeable to the parish—is punishable by fine and imprisonment

as a crime, under the Poor Law statute (8 and 9 Vict., c. 83, sec. 80).

291. But when the period of childhood is past, the obligation which lay on the father is held to be transferred to the children; and thus, if an indigent person has both a father and a son alive, the burden of his maintenance will fall, in the first instance, on the son. (Brown, 1710; M. 448; Fraser, ii. 34; Muirhead v. Muirhead, July 7, 1849, and Dec. 15, 1849.)

292. In the event of the descendants of a party being unable to aliment him, the obligation falls on the father, as the nearest ascendant, then on the mother, and after her on the paternal ascendants in the order of their proximity. When the paternal ascendants are exhausted, it would seem that a claim exists against maternal ascendants. (Dunlop, Poor Law, sec. 36.)

293. Collaterals are not bound to aliment each other; the only apparent exception being that of an elder brother who has succeeded to his father's estate. In this case, however, it is not as the brother, but as the father's representative, that he is bound to fulfil the obligation which lay upon him of providing for the subsistence of the younger members of his family. (Drummond v. Swane, Jan. 25, 1834.)

294. The amount of aliment which the law will enforce is merely "support beyond want, and all beyond that is left to parental affection." (House of Lords, in Maule v. Maule, June 1, 1825.)

295. The only case in which a separate aliment will be decreed to the child, is where the parent offering to receive him into family has formerly maltreated him, or where his person or morals are in danger. (Ersk. i. 6. 56.)

296. The rule is different where a descendant offers to take an ascendant—*e.g.*, a grandfather—into family; and the Court will not enforce such an arrangement. (Jackson, Nov. 17, 1825; White, March 10, 1829, Dunlop, sec. 41.)

297. A father, being bound to aliment his child, is held to have given authority to the latter to contract for necessities, and thus to found an action against him to that extent, where he has not otherwise fulfilled the parental obligation. (Ersk. i. 6. 57; Fraser, ii. 37.)

298. The father is not liable for the child's crimes, or even for his quasi delicts. He is not bound to pay a fine imposed upon him, nor would he be liable for damages should the child break his neighbour's windows, demolish his trees, or slander him, unless by manifest negligence he connected himself with the wrong done. (Haddan v. Stainhouse, 1 Br. Supp. 237. See also, by way of illustration, Fleeming v. Orr, H. of Lords, 3d April 1855.)

299. If the child be working at a trade or profession, by which he is able to earn as much as will support him, he cannot demand aliment from his father. (Stair, i. 5. 7; Ersk. i. 6. 58.)

300. In the higher ranks, where children are educated to liberal professions in which employment is precarious, the mere name of a profession, such as advocate, or doctor of medicine, without practice, is not enough. The principle on which the Court in this case hold the father liable in aliment is, that by training his child to such a profession he tacitly becomes bound to maintain him till he receives employment. (Ayton v. Colvil, M. 390; Maule v. Maule, *ut supra*.) If the failure of the son has arisen from his dissipated and irregular habits, the Court will not interfere. (A. B., March 9, 1848.)

301. When the child has been trained to no profession or trade, the obligation of the father subsists after majority; but only so long as is necessary to enable the child to acquire a trade. (Samson v. Goldie, Hume, 425.)

302. If a child has a separate fortune of his own, it is thought that the parents are not bound to maintain him, and may claim board if they do so. (Fraser, ii. 42; Hamilton v. Hamilton, 11th July 1834; Menzies v. Livingston, 27th Feb. 1839.)

303. Daughters in the higher ranks must be alimented till marriage; in the lower, till they are of age to go to service. (Cairns v. Bellamore, M. 410; Dunn v. Mathews, 22d Jan. 1842.)

304. The obligation to aliment a married daughter lies on her husband, even where she continues to reside in family with her father; and if he is unable to implement his obligation, it falls on his father before her father. (Dunlop's Poor Law, p. 38; see *infra*, "Poor;" Wallace v. Goldie, July 20, 1848.)

305. A daughter, if possessed of sufficient means, is bound to aliment her mother (Muirhead, July 7, 1849), and a granddaughter her grandmother (*ib.*, Dec. 15, 1849.)

306. The obligation to aliment is not affected by any amount of extravagance or improvidence on the part either of parents or children, and it cannot be removed by compact between them. (Fraser, ii. 42.)

307. The heir is bound to aliment both sons and daughters till their provisions become due. Whether he would be entitled to claim repetition would depend on the relative extent of the provisions, and the other circumstances of the case. (Fraser, ii. 43. 45; and cases cited.)

308. The duties of reverence and obedience have no "civil remedies" (Stair, i. 58); but it is declared by the statute 1661, c. 20, that where a child above the age of sixteen, and not being distracted by harsh or cruel treatment, shall beat or curse a parent, he shall be punished with death. The pains of law are usually restricted to transportation. (Fraser, ii. 46.) In less serious cases such offences are tried at common law in the police courts, the relationship of the parties being regarded as an aggravation.

309. *Bastards* have no father in the eye of the law; but this doctrine is not allowed to apply to questions of aliment. The law of Scotland holds both the father and mother liable to

aliment, and the question is generally raised by an action at the mother's instance against the father. (Ersk. i. 6. 56; Fraser, ii. 49.)

310. The future aliment of a natural child forms a debt against the deceased father's estate. (Fraser, *ut supra*.)

311. Failing the father and mother, the burden of supporting a bastard falls on the parish where the mother has acquired a settlement. (*Infra*, see "Poor.")

312. If a stranger should aliment the child, he has an action of relief against the father, mother, and parochial board. (Matheson v. Hay, 23d Dec. 1831.)

313. The right to arrears of aliment is not cut off by the triennial prescription. (Thomson v. Westwood, 26th Feb. 1842.)

314. In the case of bastards, as of legitimate children (*ante*, sec. 294), the rank or fortune of the parents will scarcely be taken into account in fixing the amount; "support beyond want" being all that can be legally vindicated. (Lamb v. Paterson, Dec. 6, 1842.)

315. Aliment, as a general rule, will be due till the child is able to earn a subsistence (Adair v. Corrie, Feb. 24, 1860); and it will be claimable during life, if it be physically or mentally incapable of supporting itself (Majoribanks v. Amos, 30th Nov. 1831).

316. The mother of a bastard child is entitled to claim from its father a sum for inlying charges; and in peculiar cases the Court have allowed a claim against the father for medical attendance and school fees to the child; "thus, in truth, imposing on the fathers of illegitimate children the peculiar obligations incumbent on the fathers of lawful offspring." (Fraser, ii. 51.)

317. The custody of bastards belongs to the mother; but her claim for aliment, when the child has passed the age of seven, will be barred by an offer on the father's part to take the child



into his own keeping. (*Adair v. Corrie*, Feb. 24, 1860. See sec. 280.) The father may claim the custody of the child, however, even at an early age, if his object be to teach it a trade, and thus put it in a position for acquiring a subsistence.

318. In general, when the child is in infancy, the Court will leave it with the mother, however mean her rank, or however great its prospects or its fortune. But when the father is dead, and the child has passed the age of seven, if it has succeeded to extensive means, it will be taken from the mother and delivered to trustees, to be educated in a manner befitting its future position. (*Baxter v. Dougal's Trustees*, July 5, 1825 ; *Whitson v. Speid*, May 25, 1825 ; *Fraser*, ii. 53.)

319. A mother is liable to aliment her indigent child, though he have squandered his fortune, and be major (*Macdonald v. Macdonald*, June 20, 1846); but a step-mother is not liable to aliment a step-son (*ib.*).

320. The protection and guardianship of infants, formerly exercised by the Scotch Privy Council, now belongs to the Court of Session, as the Supreme Court of equity. (*Baillie v. Agnew*, Br. Supp., v. 526 ; and Lord Bute's case, *Stuart v. Moore*, Nov. 23, 1860, and Mar. 20, 1861 ; see sec. 376.)

321. In actions of aliment, a lower degree of evidence was, by the former practice, held to establish the presumption of paternity than would have been necessary to prove a fact in another action. This evidence was supplemented by the oath of the pursuer.

322. As to the amount of evidence requisite to admit the oath in supplement, it was said by Lord President Blair to be such "as induces a reasonable belief, though not complete evidence ;" and this opinion has been affirmed by the Court, with the observation that "it has been oftener quoted, and been the foundation of more judicial decisions, than any other opinion that ever was delivered." Wherever the oath emitted in supplement was at variance with special facts already established by proof, the

defender was assoilzied, though the general question was answered in the affirmative. It was, in short, nothing more than the evidence of the pursuer, which, since the recent change of the law of evidence, is competent in all actions.

323. It is now held that, in actions of filiation and aliment, the testimony of the mother of an illegitimate child, given by her in the position of a witness, is liable to be tested by cross-examination, and its credibility weighed by the rules which apply to the testimony of other witnesses; and an opinion has been expressed to the effect that the oath in supplement is no longer competent. (*Scott v. Chalmers*, Dec. 2, 1856.)

324. Children are the natural heirs of their parents, and entitled to succeed to their whole property, both heritable and moveable, where they die intestate. As regards heritage, this right may be wholly defeated by the parent by means of a conveyance in favour of a stranger, executed whilst in vigour, though intended to take effect only after death. There are certain rights, on the other hand, which the child possesses over the parent's moveable property, of which he cannot be deprived by the parent's deed, intended to take effect after death, whether executed, in point of form, *inter vivos* or *mortis causa*. The child's claims, however, do not affect the father's right to alienate his property during his lifetime, or to contract debt.

## CHAPTER III.

### GUARDIANSHIP.

325. Guardianship, as it is called in England, or the government of those who are not possessed of full legal capacity, is divided by the law of Scotland, in accordance with the Roman law, into Tutorship and Curatorship.

326. The object of tutory is the protection of those in whom, from nonage, the law recognises no power to contract, to alienate, or to perform any other act inferring an obligation, to the constitution of which a consenting mind is requisite. (*Infans, et qui infantiae proximus est, non multum a furioso distant.*—*Inst.*, L. iii., t. xx., sec. 9.) The tutor thus stands in the pupil's place, and acts for him as he himself ought to do were he of perfect age.

327. The object of curatory is to afford assistance in the management of their affairs to those who, though past pupilarity, have not attained majority, and to those, of whatever age, who, from infirmity of understanding, are incapable of dealing on equal terms with persons of entire capacity.

328. The tutor thus *grants* the pupil's deeds for him, whilst the curator *consents* to those of the minor.

329. Pupilarity, the period of life to which tutory applies, extends to fourteen in males, and twelve in females. It is to this period of life exclusively that the term infancy, which in England includes the whole period of nonage (*Tomlin's Dic.*), is applied in Scotland. Minority, to which curatory applies, extends from the termination of pupilarity to the age of twenty-one in both sexes. Majority, during which a sane man is subject to no guardianship, is the whole life after twenty-one. (*Stair*, i. 5. 3, 10. 13; *Ersk.* i. 1. 11, and i. 7. 1.)

330. By the Roman law, an *approach* to majority was held to modify the character of minority; and so of the other periods (*Inst.* iii., tit. xx., sec. 10; *Savigny, System des Heutigen Rom. Rechts*, vol. iii., p. 37). No such distinction is recognised by our law; and a youth who wants but a day of twenty-one will be as much incapacitated as if he were fifteen. Still *Erskine* says (i. 7. 1), that the law of Scotland makes some difference in each of the stages recognised by the Roman law; and to some extent the Court is no doubt guided by them in determining as to the

expediency of leaving children in the custody of their mothers, granting them separate aliments, and the like.

### I.—*Tutary.*

331. In all cases in which pupils appear as actors, they must act by their tutors; but the reverse is the case where they are merely passive. Deeds granted by the pupil thus proceed from the tutor directly, and make no mention of the pupil's consent; whereas those granted to the pupil are taken to him directly, and make no mention of the tutor's consent. (Ersk. i. 7. 14; Kennedy v. Innes, 6th June 1823.)

332. We have borrowed from the Roman law (Inst. i. 21, and Dig. ii. 14. 28, 26. 8. 9) one exception to the rule that deeds granted or contracts entered into by a pupil are null, viz., where they are beneficial to himself. The principle of this exception is, that, in order to deter those who might impose on the weakness of pupils, the law favours them by granting to them the power of making their condition better, whilst it prevents them from making it worse. (Ersk. i. 7. 33.) The same principle is applied to transactions with married women. (Sec. 50.)

333. When a pupil sues, the proper mode is for the tutor to raise the action in his tutorial capacity, and to conclude for payment to himself. (Shand's Practice, p. 140; M'Neil v. M'Neil, M. 16384; Keiths v. Archer, 24th Nov. 1836.)

334. A pupil will be entitled to institute an action himself, if his tutor be the defender or have an adverse interest. In this case, a tutor *ad litem* will be appointed to the pupil when the case comes into Court. (Shand, *ut supra*.) The opposite party is entitled to ask for the appointment of a legal guardian to the pupil, as otherwise decree, though obtained against him, would not be effectual. (Ibid. 142; Calderhead v. Calderhead, 26th May 1832.)

335. An unborn child has many legal rights, and a tutor may

consequently be appointed to him for their protection. (Fraser, ii. 70; *Murray v. Marshall*, M. 16226.)

336. The father is both tutor and curator to his children, under the name of administrator-in-law. He requires no judicial proceeding to invest him with these offices (Stair, i. 5. 12; Ersk. i. 6. 55), even where the child has separate property; and it is thought that he is not incapacitated by the fact of his being himself a minor. (Fraser, ii. 71; Bruce, *Tutor's Guide*, p. 43.)

337. Neither paternal nor maternal grandfathers can exercise either office without special appointment (Stair, i. 6. 6; Ersk. i. 6. 55); and the mother is in the same position (Stair, *ut supra*; Ersk. i. 7. 2).

338. The father of a bastard is not his administrator-in-law (Ersk. i. 6. 55; *Wilson v. Campbell*, 10th March 1819, F. C.); but a father who is himself a bastard is so to his own lawful children. (*Muir v. Kincaid*, M. 1349 and 16250, etc.)

339. If property be gifted to a child by a third party, and trustees appointed by the donor to manage it, they will be entitled to do so to the exclusion of the father. Their powers, however, are confined exclusively to the management of that fund. (Ersk. i. 6. 54, and i. 7. 2.)

340. Religious opinions now form no ground of disqualification for the office of tutor, unless they involve practices which are grossly immoral. (10 Geo. IV., c. 7, sec. 10.) An outlaw cannot be a tutor or curator. Aliens cannot be appointed, but the law recognises their paternal authority. (Fraser, ii. 74, and cases given.)

341. *Testamentary tutors*, *tutors testamentar* as they are called in Scotland, or tutors nominate, can be nominated by the father alone. Neither the mother, the grandfather, nor any other ascendant, have this power, even after the father's death. If appointments be made by these persons they may be reduced, as

in fraud and prejudice of the tutor-at-law, and failing him of the Crown. (Stair, i. 6. 6; Ersk. i. 6. 55, and i. 7. 2.)

342. Testamentary tutors may be either male or female, provided the latter be not married. (Ersk. i. 7. 12; Johnston v. Johnston, M. 16222.) They must be twenty-one years of age.

343. A father cannot nominate tutors to his bastard children; but he may leave property to them, under the condition that it shall be managed by a party appointed, and that the children's custody and education shall be as he may direct. The manager so appointed is not a tutor, but a factor or trustee. (Ersk. i. 7. 2, *et seq.*; Bell's Prin., sec. 2071; Johnston v. Clark, M. 16374.)

344. Tutors are generally appointed in the last will and testament of the father, but the nomination will be effectual by any deed or writing which sufficiently indicates his will. (Stair, i. 6. 6; Ersk. i. 7. 2.)

345. Though the word "governors" be used for "tutors," the effect will be the same (Nimmo v. Robertson, M. 16239); and the interpretation clause of the recent Act relative to the resignation, power, and liabilities of gratuitous trustees (24 and 25 Vict., c. 84, sec. 3), so defines a "gratuitous trustee" as that it would almost seem to include tutors under it.

346. Several tutors may be appointed, and in this case a certain number is usually specified to be a quorum.

347. The father being presumed to have satisfied himself of the personal honour and the sufficiency of the fortunes of those whom he selects as tutors to his children, they require no service or other judicial proceeding prior to entrance on the office. (Stair, *ut supra*; Dishington v. Hamilton, M. 16227.)

348. They are not obliged to take the oath *de fidei*, or to find caution, unless when insolvent, or where clamant suspicions of their honesty exist. In these cases, the Court of Session, on ap-

plication by any relative of the pupil, will ordain them to find security. (Stair, *ut supra* ; Ersk. i. 7. 3 ; Fraser, ii. 81.)

349. No dispensation from the father even can free them from the duty of making up tutorial inventories. (Bell's Prin. 2081 ; Fraser, ii. 81 and 96 ; Stat. 1672, c. 2, *infra*, sec. 351, *et seq.*)

350. At common law, tutors are liable for omissions as well as intromissions, and *singuli in solidum*, or each for the whole loss incurred by the trust ; but this " having frightened many from accepting the office, and thereby several pupils being left destitute," it was enacted by the Stat. 1696, c. 8, that the father might nominate tutors with the qualification, " that they shall not be liable for omissions, but only for their actual intromissions with the means and estate descending from the father, and that each of them shall only be liable for himself, and not *in solidum* for others." By the recent Act, 24 and 25 Vict., c. 84, the Legislature has taken a further step in the same direction, by providing (sec. 1) that all trusts constituted by deed under which gratuitous trustees are nominated, unless the contrary be expressed, shall be held to include a provision to the effect, that " each trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of his co-trustees, and shall not be liable for omissions." (*Supra*, sec. 345.)

351. A *factor* may be appointed by the father, along with the tutors, to act under their direction ; and when so appointed, he cannot be removed by them without just cause. (*Fulton v. M'Allister*, 15th Feb. 1831.)

352. A *tutor-at-law* is so named because he takes the office by the disposition of the law itself, in case testamentary tutors have either not been appointed, have declined to accept, failed after acceptance, or become incapacitated to accept or to act.

353. The *tutor-at-law* is the nearest male *agnate* to the pupil, —i.e., his nearest kinsman by the father's side. (Stair, i. 6. 8 ; Ersk. i. 7. 4.) No female can be a *tutor-at-law*.

354. A bastard can have no tutor-at-law, because he has in law no father, and, consequently, no relative on the father's side. (A. v. B., M. 16219.)

355. A tutor-at-law must be twenty-five years of age, the period of majority by the Roman law. (Stat. 1474, c. 51 ; Inst. L. i., tit. 23 ; Dig. iv., tit. 4.) As to custody of pupil's person, see *infra*.

356. The tutor-at-law must be formally vested in the office by a service, or legal proceeding in which the grounds of his claim are proved to the satisfaction of a jury of fifteen men.

357. This proceeding may be brought under review of the Supreme Court. (Miller v. Sawers, 5th June 1841 ; Godwin v. Sawers, 24th June 1842.)

358. A *tutor dative* is appointed where there are neither tutors testamentar nor tutors-at-law.

359. Guardians of this class have always been nominated by the Crown, latterly through the medium of the Court of Exchequer, now the Court of Session. (19 and 20 Vict., c. 56.) See *infra*, Court of Exchequer.

360. The Court usually prefer to appoint those to whom the father or other relatives have shown a predilection. Such are testamentary tutors whose nomination has fallen by the failure of a quorum or a *sine quo non*. (Stair, i. 6. 11.)

361. The law of Scotland differs from the law of Rome, in placing it entirely within the option of the tutor to accept or decline the office. (Stair, i. 6. 11.) As to the tutor's power of resigning the office, see *infra*, sec. 400.

362. Tutors-at-law and tutors dative must find caution for their intromissions.

363. *Tutorial inventories* are appointed to be made by the statute 1672, c. 2, the chief provisions of which were borrowed from the Roman law.

364. The two next of kin of the pupil, both on the father's and



mother's side, must be made parties to the transaction, and the inventory must be subscribed by them, and by the tutors or curators.

365. When the nearest of kin refuse to appear or to concur, the inventory will be made up at the sight of the Judge Ordinary (Sheriff) of the bounds, or of a delegate appointed by him.

366. The inventory so made up will be as effectual as if the nearest of kin had appeared and concurred.

367. The inventory must contain a description of the whole heritable and moveable estate of the pupils.

368. An inventory must be prepared in every case, even where the pupil has but one possession. By the Pupils Protection Act (12 and 13 Vict., c. 31, sec. 3, 25) all judicial factors, and persons served tutors-at-law or appointed tutors dative to pupils, are required, within six months, to lodge with the Accountant of Court a distinct rental of the lands, and an inventory of the moveables entrusted to their charge. They must also close their accounts once in every year, on a day fixed by the Accountant, and lodge an account with him within a month of that day. (Sec. 4.)

369. Tutors testamentar, equally with tutors-at-law and tutors dative, are bound to make up inventories; but they are not under the provisions of the Pupils Protection Act.

370. Fathers alone are not bound to do so.

371. The debtors of the pupil are not bound to pay to the tutors, unless they can show that the sums demanded are contained in the inventories, or eiks (additions), made up in terms of law. (Fraser, ii. 93, *et seq.*)

372. *The custody* of the child belongs to the father during life as its natural guardian (*ante*, 282); and should he have nominated any one to take charge of it after his death, this nominee will be preferred even to the mother, unless the child be in infancy. (A. v. B., M. 16224; Forbes v. Caithness, M. 16241.)

373. Failing the father's appointment, the mother is entitled to the custody.

374. As a general rule, she will lose the custody if she enter into a second marriage; and the pupil will be delivered to the tutor, or next cognate. (Fraser, ii. 105, and cases cited.)

375. The person of the pupil will not be entrusted to a tutor who is his heir, because his interests are adverse to the pupil's life. (Stair, i. 6. 15.) Such an arrangement has been described as "*Agnum lupo committere ad devorandum.*" (Co. Litt. Judl. 88; Blackstone, i., c. 17.) The tutor will be debarred even though he be heir only in part of the pupil's estate. It is for this reason that, failing the mother, the nearest *cognate*, or relative on the mother's side, is chosen, and that the nearest *agnate* is deprived of the custody of the pupil's person, even where he is his tutor-at-law. (Ersk. i. 7. 4; Higgins, June 7, 1821, F. C.; Bell's Prin. sec. 2076.) But if the nearest cognate be a man of loose and dissolute habits, if he has shown personal enmity to the pupil, or if there be any other objection which seems sufficient, the Court will not entrust him with the custody. (*Dishington v. Hamilton*, M. 16227.)

376. It belongs to the Court of Session, as the supreme court of equity, to regulate the custody of pupils; though an application to a Sheriff for that purpose does not seem to be incompetent. (*Lang v. Lang*, S. and D., June 30, 1849; see also *Jurist*, p. 485.) In the case of the custody of illegitimate children, applications to the Sheriff are of common occurrence in Edinburgh. (See sec. 320.)

377. *The education* of the pupil is properly entrusted to the tutors; and while the Court will, as much as is consistent with his advantage, give the custody of his person to the mother, they have often interfered at the instance of the tutors, and directed that the child be placed at their disposal, in order to its proper education.

378. They have held the tutor, though not entitled to the custody, entitled to direct the education of the child, and to superintend it. In several cases they have constituted themselves judges of the conflicting statements of parties, and decided for the mother or the tutor, according as they preferred the mode of education that either proposed. (Fisher v. Sarmon, 21st Dec. 1827 ; Campbell v. Campbell, 7th March 1833.)

379. "Where the father has chalked out a course of education for the child, his injunctions will be obeyed, unless they are immoral or irreligious." (Fraser, ii. 109.)

380. The tutor is not entitled, in his management of the pupil's affairs, to *alter the succession* to his property,—as, for example, to change a bond destined to executors into a bond secluding them. (Ersk. i. 7. 8.) This rule applies even to the father acting as administrator-at-law. (Morton v. Young, 11th Feb. 1813.)

381. It often happens, in the management of the pupil's property, that its nature of heritable and moveable is altered, without any intention on the part of the tutor of affecting the succession.

382. It is generally agreed that the tutor's acts do not change the succession, though the nature of the subject be altered from heritable to moveable, or the reverse. In all cases, on the contrary, where the result happens by the operation of a public law, or the diligence of creditors, or any other cause over which the tutor has no control, the succession will be regulated by the legal character of the property in the state in which these changes have left it. (Fraser, ii. 129 ; Bell's Com. ii. 847.)

383. The tutor is not at liberty to speculate with the funds of his pupil, however tempting the venture may be, or however insignificant the apparent risk. (Bankt. i. 7. 36 ; Fraser, ii. 131.)

384. If the father was a merchant or manufacturer, having large works which cannot be immediately disposed of, the tutor is entitled to exercise his own discretion as to the best mode of securing the property of his pupil from risk, keeping in view the

rule, that his first duty is to preserve it, not to increase it. (*Plumber v. Tutors*, M. 16358; *Philip*, 22d Nov. 1827; *M'Farlane v. Burgess*, 27th May 1828; *Graham v. Hopeton*, M. 5599; *Stair*, i. 6. 18; *Ersk.* i. 7. 24; *Fraser*, ii. 131.)

385. A *factor* may be appointed by the tutor to assist him in managing the affairs of his ward. (*Ersk.* i. 7. 16.) Unless in cases of misfortune, which could not have been anticipated, the tutor will be liable for the transactions of the factor. (*Stair*, i. 6. 13; *Home v. Pringle*, 30th Nov. 1837, affirmed 22d Jan. 1841.)

386. The salary of the factor must be moderate, as the tutor will not be allowed to take credit for the excess in accounting with the pupil. (*Graham v. Hopeton*, M. 5599.)

387. If a tutor is himself factor, the Court will not allow him a salary unless there be a clause in the deed by which the tutor or tutors were appointed, authorizing them to appoint one of themselves to the office. (*Home v. Pringle*, 22d June 1841, *Rob. App. Cas.*)

388. The tutor cannot lend to his pupil or borrow from him, even on heritable security, nor can he do any deed by which either he himself or his own relatives may be benefited. These rules, however, will be understood in a reasonable sense. (*Elphinstone v. Robertson*, 28th May 1814.)

389. A tutor testamentar is not liable for so high a degree of diligence as a tutor-of-law or a tutor dative, because he did not seek the office, whereas they did.

390. In the former case, the amount of diligence which the tutor devotes to his own affairs will be sufficient; in the latter, the amount of diligence which a *prudent* man (*providens paterfamilias*) employs in the management of his affairs will be incumbent. (*Stair*, i. 6. 21, with *More's* note; *Ersk.* i. 7. 26.)

391. Fathers will be liable only for gross and glaring negligence (*crassa negligentia*). (*Stair*, i. 5. 12; *Ersk. ut sup.*)

392. The liabilities of a tutor who has once accepted will not be diminished though he has lain by altogether, and allowed the other tutors to manage, or mismanage, the estate. To plead that he has not acted, is to plead neglect of duty. (Ersk. i. 7. 27; *Murray v. Murray*, May 30, 1838; *Kennedy v. Wightman*, 28th June 1827.)

393. Amongst themselves, tutors are liable according to their actual intromissions. (Fraser, ii. 155, and cases given.)

394. All tutors, except tutors testamentar, are now placed under the superintendence of the Accountant of the Court of Session, appointed by the Pupils Protection Act (12 and 13 Vict., c. 51), and their accounts are audited according to the provisions of that statute. (See its provisions under Factors *loco tutoris*, infra.)

395. *Tutary may terminate* from any one of the following causes.

396. (1.) The pupil's arrival at puberty. This rule holds with regard to each pupil successively, though there may be several of different ages, who consequently cannot attain to puberty at the same time. The father cannot prolong the term of pupilarity. (Stair, i. 6. 24; Ersk. i. 7. 29.)

397. (2.) The death of the tutor or pupil. Death, in this case, includes civil as well as natural death. On the tutor's death, his heir is not entitled to the office merely in consequence of his being heir; and the proper course is, for the nearest agnate to serve tutor-at-law, or for the next of kin to obtain the appointment of a tutor dative, or a factor *loco tutoris*. (Stair et Ersk. *sup.*; Fraser, ii. 158.)

398. (3.) The marriage of a female tutor voids the office. "This is a rule which no provision of the testator can dispense with." (Stair, i. 6. 23; Fraser, ii. 75.)

399. (4.) If the tutor has been appointed conditionally, the office will become vacant on the occurrence of the contingency named in the deed of appointment. Under this head come the

very common cases of a number of tutors being appointed jointly, and of a quorum, or sine quo non, being named. If any one in the first or second cases, or the sine quo non in the third, fail, the whole nomination is at an end. When tutors testamentar have been appointed without any express statement of their being joint, the nomination does not fall by the death of one, or even of the majority of the whole. A different rule holds as to tutors dative. By the death of one, the whole nomination fails, unless there be some declaration to the contrary. (*Stewart v. Baikie*, 28th Jan. 1828; *Stewart v. Scott*, 29th Feb. 1832, reversed by H. of L. 7 W. and S. 211; *Fraser*, ii. 90 and 159.)

400. (5.) Resignation of the Office.—A tutor is not entitled to resign after he has entered on the management of the estate. (*Stewart v. Dunkeld*, M. 16248.) The consent of his co-tutors would not validate the resignation of one of them. (*Logan v. Meiklejohn*, 26th May 1843.) But though tutors cannot free themselves from the responsibilities of the office at their own hands, seeing that many cases occur where their continuance in office would be prejudicial to the ward, the practice has been introduced of applying to the Court for liberty to resign. Infirm health has been sustained as a sufficient ground for resigning. (*Munnoch*, July 7, 1837.) It had been decided (*Gilmour's Trustees*, Feb. 7, 1852), that a clause in a family trust deed empowering trustees to resign is effectual; and it is now provided by 24 and 24 Vict., c. 84, that this power shall belong to "gratuitous trustees" under any deed which does not contain a clause expressly taking it away. It is very doubtful whether this would include a tutor. It has not yet been decided whether a clause conferring power to resign on a tutor is effectual.

401. (6.) Removal as Suspect.—Although guardians are not, as they were by the Roman law, considered public officers, the law of Scotland has so far retained the principles of that system, as to hold them amenable to the Court of Session as the supreme

court of equity. It is not necessary, in order to warrant his removal, that the conduct of the tutor shall have been dishonest ; it is enough if, through incapacity, bad health, or negligence, he do not perform the duties which his office imposes on him. (See rule stated in Bruce's Tutor's Guide, p. 296 ; Stair, i. 6. 26 ; Ersk. i. 7. 29.)

402. Incapacity may be moral, as well as intellectual or physical ; and female tutors who have had bastard children, or are otherwise proved to have been guilty of fornication, have been removed. (Wood *v.* Monypenny, M. 16226.)

403. The ground of removal which most frequently occurs in practice, is failure to make up tutorial inventories. (*Ante*, sec. 363, *et seq.*)

404. The action of removal may be raised by the pupil himself, authorized by a tutor *ad litem*, and is competent also to a co-tutor or to any of the pupil's relations. But persons unconnected with the pupil have not, as in the Roman law, a right to interfere. A judge may also, *ex proprio motu*, remove a tutor who, in the course of an action, has been incidentally proved guilty of acts rendering him suspect. (Fraser, ii. 164, and authorities.)

405. All tutors may be removed, even fathers. On the removal of the tutor, the Court will appoint a factor *loco tutoris*, if none having a better title claim the office. (Johnstone *v.* Wilson, 11th July 1822 ; Wotherspoon, M. 16372.)

406. *An action of count and reckoning* (*actio directa tutelæ*) is competent if the tutor neglects to account at the termination of the tutory, not only to the ward, but to his heir and his creditors, and not only against the tutor, but against his heir. (Ersk. i. 7. 186.)

407. Where the balance is in favour of the tutor, a corresponding action of accounting (*actio contraria tutelæ*) may be instituted by him. (Ersk. i. 7. 187.)

408. The office of tutor is entirely *gratuitous*, being supposed

to be discharged not from mercenary motives, but from kindly feelings of relationship or affection. The rule, particularly if the principle of the recent Act relative to the resignation, powers, and liabilities of gratuitous trustees (24 and 25 Vict., c. 84, *supra*) should either be found judicially to apply, or should be extended by legislation to tutors, need scarcely ever be attended with hardship, as tutors may appoint factors with salaries, who will manage the whole affairs of the trust, leaving nothing for the tutors to do but to examine their accounts.

409. The action of accounting, whether by pupil against tutor, or tutor against pupil, prescribes, if not raised within ten years after the termination of the office. The statute by which this limitation was introduced (1696, c. 9) also provides, That it shall not run against minors; that is to say, that the ten years are counted from the majority.

## II.—Curatory.

410. The distinction between tutory and curatory, and the different objects of the latter, have been already pointed out in treating of guardianship in general. (*Ante*, p. 55.)

411. Minors are regarded by the law of Scotland as having sufficient capacity for the ordinary business of life; but not as possessing that matured understanding and experience necessary to render their deeds unchallengeable under all circumstances. To supply this deficiency is the object of curatory.

412. As a general rule, a minor without carators may competently perform all the acts which are competent to one who is major, under the qualification, that if the minor can prove lesion within four years (the quadriennium utile of the Romans), the acts done by him will be set aside. In such circumstances, no one, of course, is willing to contract with him, and hence the necessity for appointing a curator to give validity to his deeds. (Stair, i. 6. 32; Ersk. i. 7. 38.)



413. A deed by a minor having curators, without their consent, is in general null, except so far as he is benefited thereby. (Fraser, ii. 209 ; see secs. 436, 448 to 482.)

414. A minor may test on his moveable property, however valuable ; and he may sell his heritage, or otherwise dispose of it, for onerous causes, subject to the condition already mentioned ; but he cannot gratuitously convey it to any other but his heir-at-law, and to him only *mortis causa*. (Fraser, ii. 178, 208.)

415. A minor cannot hold a public office, or even such quasi public offices as trustee on a sequestrated estate (Threshie, 30th May 1815, F. C.), because it would be incongruous to allow him irrevocably to bind the creditors of the bankrupt ; whereas, if he had been dealing with his own affairs, he could have claimed restitution on the ground of minority and lesion. (Fraser, ii. 180.)

416. He cannot be a juror or a commissioner of supply ; but it has been held, with some difference of opinion, that he may be a sheriff-clerk depute. (Heddell v. Duncan, 6th June 1810.)

417. Persons competent to be tutors (*ante*, p. 69) may be curators, and those who are ineligible to the former office are also ineligible to the latter.

418. Curators are appointed in four ways :

419. (1.) *Ipso jure*, i.e. by the action of the law itself. It is in this way that the father is curator as well as tutor to his children ; and he consequently requires no judicial proceeding, or other form of appointment, to vest him with the office. (Stair, i. 5. 12, and i. 6. 35 ; Ersk. i. 6. 54.)

420. The minor cannot choose curators for himself during his father's lifetime, even where he is possessed of separate property. But the father may resign this right, and allow the minor to choose other curators ; and if the minor have an interest in a law-suit adverse to his father's, a curator *ad litem* will be appointed. (Stair, i. 5. 12 ; Ersk. i. 6. 54.)

421. Where property has been left under the express con-

dition that the father shall not have the administration of it, the minor may choose curators. (Ibid.)

422. The grandfather is not curator *ex lege*. (Stair, i. 6. 6; Ersk. i. 6. 55; Harpers, M. 16262.)

423. Bastards are not under the curatorial power of their natural father, nor can he appoint them curators. They may choose curators during his life, and against his will. (Wilson v. Campbell, 10th March 1819, F. C.; Ersk. i. 6. 55; Fraser, ii. 184.)

424. As the husband, in all cases, becomes by marriage the guardian of his wife, and the curatory of her father and all others over a female minor ceases on marriage, a husband does not require to find caution, or to make up inventories. (A. v. B., M. 8929; Ersk. i. 7. 29.)

425. (2.) *By testament*.—The common law of Scotland, following what to a certain extent was that of Rome, denied to fathers the power of appointing testamentary curators. This was altered by the statute 1696, c. 8, which conferred on fathers the right of nominating curators to their children, whom the latter are compelled to accept, at least with reference to an estate descending from the father himself. (Ersk. i. 7. 11; Fraser, ii. 185.)

426. The rules for their appointment are the same as in the case of tutors. (*Ante*, p. 69.)

427. They are not bound to find caution, but they may be removed as suspect by the Court, on the application of any near relative of the minor. (Bell's Dic., v., Curator.)

428. (3.) *By choice of the minor*.—The form of appointment of this class of curators was regulated by express statute so early as 1555, c. 35. The proceeding may take place either before the Sheriff Court of the county or the Court of Session. Two of the most "honest and famous" of the minor's kin, both on the father's and mother's side, must be cited to appear in Court, to hear and see curators given to the minor. (Ersk. i. 7. 11; Fraser, ii. 188.)

429. Where the children are bastards they have no legal kin ; but the Court will hold those on the mother's side to be so for this purpose. (A. B., 23d June 1838 ; Fraser, ii. 94 and 189.)

430. If there are no kin, in point of fact, the Court will still nominate curators, dispensing with citation of kin. (Fraser, ii. 189.)

431. (4.) *By the Court of Session.*—The appointment of curators to manage particular actions is of every-day occurrence ; and if not applied for by the opposite party, will commonly be made by the judge of his own accord.

432. Curators of all kinds are entirely at liberty either to accept or decline office. (Stair, i. 6. 30 ; Ersk. i. 7. 20.)

433. Curators are bound to make up inventories of the minor's estate in the same manner and under the same penalties as tutors. (*Ante*, 71 and 72.)

434. As already explained in the general remarks on Guardianship, the duties of the curator differ essentially from those of the tutor. Those of the curator consist in giving the minor counsel for the guidance of his own acts, and validating them by his consent ; those of the tutor in acting for him.

435. But the powers and duties of all curators are alike. Fathers, testamentary curators, and those chosen by the minor himself, possess the same authority, with this explanation, that the powers of the two latter classes may be modified by the deed of nomination. (Stair, i. 6. 35 ; Ersk. i. 7. 15 ; Foster v. Foster, M. 16238.)

436. The curator has no power over the *person* of the minor. He may marry (Ersk. i. 7. 33), go abroad, and fix his domicile where he pleases, and no guardian or court can restrain him. This was held to be law in the case of a girl who was only twelve years and five days old, and has reference to fathers as well as other curators. It has been made a question by our older writers, whether the father, apart from his curatorial character, has any

control over the person of his minor children corresponding to the Roman *patria potestas*. (Dirleton's Doubts, p. 112.) Professor More, in his Notes to Stair (xxxi.), says, "When it is kept in view that, by the law of Scotland, marriage may be contracted immediately after pupilarity, and a separate family thus established; and further, that minors, though unmarried, are entitled (as against curators) to choose their own place of residence,—it seems difficult to maintain that children, after pupilarity, who choose to leave their father's house and to live elsewhere, can by law be restrained from doing so." He adds, that "undoubtedly they cannot claim to be alimented by their father except in family." (Stair, i. 5. 13; Ersk. i. 6. 55; Ersk. Prin. i. 7. 36; Bank. i. 6. 1. p. 153; Fraser, ii. p. 27; Marshall v. M'Dougall, M. 8930; Graham v. Graham, M. 8934.)

437. It is the duty of the curator to advise the minor as to his education; but he has no power to go beyond advice. (Marshall v. Macdougall, M. 8930; Fraser, ii. 195; Chambers on Infancy, p. 116.)

438. It is the duty of the curator to advise the minor as to his future occupation in life, and he will be justified in allowing him to invest his means in such a way as to form a stock-in-trade. (Duncanson v. Duncanson, M. 8928; Ersk. i. 7. 21 and 24.)

439. When the minor and his curator differ in opinion, the Court will not compel either to yield to the other; but they will free the curator from his office, on an application by him to that effect, and appoint another in his stead; or, if the application should proceed from the minor, they will remove the curator, if they are of opinion that his refusal to consent to the acts of the minor has been unreasonable. (Drumore, M. 16349; Elch. v. Minor, 10, 5 Sup. 737; Bell's Prin. sec. 2096; Fraser, ii. 198, *et seq.*)

440. There are many cases in which, though the curator does not act, he will be responsible for the damage which may result

from not acting (Fraser, ii. 199); and, in such circumstances, his only safe course is to resign his office with the consent of the Court. If the Trustees Act of last session (24 and 25 Vict., c. 84) apply to curators, which it probably does not, it will both diminish their responsibilities and facilitate their resignation. (*Ante*, secs. 350 and 408.)

441. The diligence incumbent on curators is the same as that required of tutors. (*Supra*, secs. 389–392; Fraser, ii. 201.)

442. The modes in which curatory terminates correspond in general to those already explained relative to tutory. (*Supra*, Fraser, 201.)

443. Curators may be removed as suspect, in like manner as tutors; for the same reasons and in the same mode. (*Ante*, p. 77; Stair, i. 6. 36; Ersk. i. 7. 29.)

444. Curatory, like tutory, is gratuitous. (Ersk. i. 7. 15; Scott v. Strachan, M. 13433.)

445. The period from which the curator's accounting must commence is the date of his acceptance of office. If he has not intermeddled with the estate, he ought to have done so. (Ersk. i. 7. 20.)

446. No minor, even with the consent of his curator, can alter the succession to his heritable estate by a gratuitous deed,—i.e., he cannot convert heritable estate into moveable estate; but he may do the reverse. (Ersk. i. 7. 18 and i. 7. 33; Fraser, ii. 212.) But he may sell his heritage without the interposition of a judge (Ersk. i. 7. 33); and even without consent of his curator he may execute a testament, bequeathing his moveable property according to his pleasure. (Ersk. i. 6. 36; *ante*, sec. 414.)

447. In order that a minor may be freed from a deed which he has executed without the consent of his curator, it is sufficient that he establish the facts of minority and lesion. Whether there was or was not fraud on the side of the other party, is not inquired into. Proof of personal ability or professional knowledge

on the minor's part will not bar the plea. (*Dundas v. Allan*, M. 9034; *Fraser*, ii. 214.) The minor's heirs, creditors, or assignees, may claim restitution. (*Stair*, i. 6. 44; *Ersk.* i. 7. 42.)

448. Marriage contracts may be set aside by minors on the head of lesion (*Stair*, i. 6. 44; *Ersk.* i. 7. 38), though the marriage itself cannot be reduced.

449. For the sake of the minor himself, the law refuses restitution in the payment of ordinary debts, rents, dividends, interests, and the like, whether made to a tutor or a minor, unless where the debtor acts fraudulently. (*Ersk.* i. 7. 36; *Fraser*, ii. 230.)

450. In order to enable minors to obtain a livelihood, the law in this respect is considerably modified when they are engaged in trade or professional pursuits. (*Stair*, i. 6. 44; *Ersk.* i. 7. 38; *Fraser*, ii. 231.)

451. There is no restitution to a minor who, by passing himself off as major, has fraudulently induced another to contract with him. (*Code*, ii. 43. 2; *Dougall v. Marshall*, M. 8995; *Stair*, i. 6. 44; *Ersk.* i. 7. 36.)

452. Where two minors contract, if no fraud be proved, restitution will take place only to the extent to which the gainer has profited by the transaction. If there has been no gain, the contract is irreducible unless on the ground of fraud. (*Ersk.* i. 7. 40; *Fraser*, ii. 244.)

453. The law of Scotland, following that of Rome, has fixed *four years* as the period within which the minor must avail himself of the privilege of getting himself restored against deeds to his hurt. (*Stair*, i. 6. 32; *Ersk.* i. 7. 33; *Fraser*, ii. 242.)

454. This rule applies to deeds which are voidable, and not to those which are void and null,—such, for example, as a deed by a pupil. Here the ground of reduction is not a privilege competent only to minors, but a right to reduce a deed which has

never been validly executed, and which, of course, belongs to every one. (Fraser, ii. 242 and 243.)

455. It is a very old rule in the law of Scotland, that the minor is not bound to plead in any suit brought against him for the purpose of depriving him of his paternal heritage. (As to the origin and effects of this rule, see Fraser, ii. 253, *et seq.*)

### III.—*Pro-Tutors and Pro-Curators.*

456. These are persons who, without any title to the office of tutor or curator, act as if they were legally appointed to these offices.

457. Though the motives of persons acting in this capacity may be excellent, they are not favourites of the law. Their administration may be honest; but they have not given the guarantees for its honesty which the law, by exacting caution, and enforcing the preparation of inventories, demands from ordinary tutors and curators. It is for this reason that, though they have none of the powers of tutors and curators, they are liable as if they had them. If a debt is lost in consequence of their neglecting to raise an action, they are bound to pay it, though, if they had instituted the action, it would have been a valid defence to the debtor, that they had no title to sue. If they neglect to lend out the minor's money, they are liable in interest. In short, if they fail to use the same diligence that an ordinary tutor or curator is bound to use, according to the rules already stated, they are liable for all loss and damage which their negligence may have caused. (Ersk. i. 7. 28; Fraser, ii. 265, *et seq.*)

458. Pro-tutors or pro-curators may be called upon at any time by the minor to account and resign their office. (Fraser, ii. 265.)

459. In this accounting they are entitled to credit for all sums disbursed profitably on the minor's account. (Ersk. i. 7. 8; Fraser, ii. 269.)

IV.—*Factors Loco Tutoris, and Curators Bonis.*

460. The formalities necessary to the constitution of the offices of tutory and curatory are of such a nature, as frequently to form obstacles to the appointment of the only parties qualified for these duties ; and the rule which prohibits any charge being made by tutors or curators for their services, however burdensome and long-continued, very frequently deters those who have been nominated from incurring the responsibilities of a guardianship that may extend over a long period of years. Hence there are many cases in which those who are most in need of protection would be deprived of it altogether, were it not for the appointment, by the Court of Session, of officers who are induced to labour by receiving remuneration for their services. The extent to which this sort of guardianship has superseded that by private appointment may be gathered from the fact, that, in 1834, the Lord President stated in a case (*William Bell's Petition*, March 7, 1834), that judicial factors had then under their management property to the value of eight millions.

461. It was for the regulation of the duties and responsibilities of this class of officers more especially, that the "Act for the better protection of the property of pupils, absent persons, and persons under mental incapacity," was passed in 1849 ; though its provisions are also applicable to tutors-of-law, tutors dative, and to persons served as curators or appointed tutors dative to insane persons and idiots. (12 and 13 Vict., c. 51, sec. 1.)

462. Judicial factors for the most part are professional persons ; but it is not necessary that such should be the case.

463. Females are not absolutely ineligible ; but it was found that so many litigations arose from their mismanagement, that the Court has latterly declined to appoint them, whether married or single. (*Horn v. Duncanson*, 6th March 1845 ; *Fraser*, March 6. 43, *Jurist*.)



464. It was formerly the rule that a minister of the Established Church should not be appointed, as his duties were considered incompatible with the proper discharge of the office (Thomson, 13th Nov. 1829; M'Culloch, 22d June 1832); but the minister of a dissenting congregation was eligible, as the Court was not supposed to know anything of his ecclesiastical character. (Hall, 18th Feb. 1830.) Recently ministers of the Establishment have been appointed (?).

465. In general, only one person will be nominated. (Pettigrew, 21st Feb. 1839, Sloan, 18th Dec. 1844, Jurist; but see Kirk, 21st May 1835.)

466. Where there is a competition between two parties for the office, the Court will usually pass them both over, and remit to the Sheriff or to the Clerk of Court to suggest a neutral person. (Robertson, 11th July 1840.) Where it seems more expedient, the Court will itself appoint without any remit. (Cowan, 13th June 1845.)

467. A bankrupt will not be appointed if any one, having interest, object (Dixon, 20th Jan. 1832); and a stepfather is considered a bad guardian (Buchanan, 4th Feb. 1832).

468. The appointment is made by one of the nearest of kin of the incapacitated person (in the case of a pupil, generally the mother) presenting a summary petition to the Junior Lord Ordinary of the Court of Session, setting forth the state of his affairs, the want of a person legally authorized to manage the estate, and suggesting some one for the office. The petition is ordered by the Lord Ordinary to be published and intimated to the nearest of kin on the father's and mother's side. (Fraser, ii. 274.)

469. If the pupil or fatuous person be illegitimate, and consequently without legal next of kin, the Court will dispense with any intimation beyond that on the walls of the Court, and in the Minute-Book. (Young, 19th Feb. 1818, F. C.; Wood, 31st May 1834.)

470. The name of the party suggested must be given in the petition, as this is one of the things to be intimated. (Buchanan, 27th Feb. 1833, Jurist.)

471. Where there is urgent necessity for an immediate appointment, the Court will appoint the person suggested to be *interim factor* (Kirk, 10th March 1827 ; A. B., 20th Nov. 1829) ; or during vacation the Lord Ordinary will appoint him till the meeting of the Court. (Baigrie, 14th Nov. 1838 ; Scott, 22d May 1845. As to the practice of the Court, see Fraser, ii. 274, *et seq.*)

472. The following are the leading provisions of the Pupils Protection Act (12 and 13 Vict., c. 51 ; 28th July 1849), already referred to, in so far as they affect judicial factors :—

473. (1.) The judicial factor must find caution for duly performing his duties.

474. (2.) He shall lodge with the accountant of the Court of Session a distinct rental of the lands committed to his management, a list of funds, and an inventory of moveables, all of which, when adjusted and approved by the accountant, shall be signed by him and the factor ; and shall form a ground of charge against the factor. If at any time thereafter additional property belonging to the estate shall be discovered, the factor shall report the same in his next account of charge and discharge to the accountant.

475. (3.) The factor shall close his accounts once a year, and lodge them with the accountant.

476. (4.) He shall lodge the money in his hands in one of the banks in Scotland established by Act of Parliament or Royal Charter, in a separate account, in his own name as factor ; and if he shall keep in his hands more than fifty pounds, he shall be charged at the rate of twenty per cent. on the excess for such time as it shall be in his hands beyond ten days ; and unless the money has been so kept from innocent causes, the factor shall be dismissed from his office, and shall have no claim for commission.

477. (5.) If the factor shall fail in the discharge of his duty, he shall be liable to such fine as the Court may determine, to the forfeiture of the whole or of part of his commission, to suspension or removal from his office, or to any one or more of such penalties as the Court, in its discretion, shall decide; and this in addition to any liability for damages done to the estate by his misconduct.

478. (6.) The factor may apply to the Court, through the accountant, for special powers not coming within the ordinary course of factorial management, either for improving the estate of a minor, or for providing for the comfort of a lunatic or other incapable, by sinking a portion or the whole of his estate on annuity.

479. (7.) The Crown is empowered to appoint a person versant in law and accounts, to be called the accountant of the Court of Session, and whose duty it shall be to superintend generally the conduct of all judicial factors and tutors and curators; to adjust their rentals, lists, and inventories; and to audit their accounts.

480. (8.) The accountant's audit and report are conclusive against the factor and his cautioner, unless objected to within twenty days. Where objections are lodged, and where the accountant adheres to his audit, the matter shall be brought before the Lord Ordinary, whose judgment shall be subject to the review of the Court, at the instance of the factor, but not of the accountant.

481. (9.) The accountant shall make an annual report to the Court of Session of all judicial factories, which shall be printed.

482. (10.) The accountant may make requisitions and orders on the factor, and report to the Lord Ordinary or the Court any disobedience to such order, or other failure of duty of which he may be guilty.

483. (11.) If the accountant shall see reasonable grounds for

suspecting malversation on the part of the factor, or such misconduct as to infer removal or punishment, he shall be entitled to lay a case before her Majesty's Advocate.

484. (12.) Factories constituted before the passing of the Act are placed under its provisions.

485. (13.) The accountant is empowered to require information from banks as to the funds of estates under his charge, and he is made the custodier of such bank receipts as were formerly lodged in the hands of the Clerk of Court.

#### V.—*Cautioners for Guardians.*

486. Cautioners are required for tutors-at-law, tutors dative, curators, factors *loco tutoris*, and curators *bonis*. (Fraser, ii. 308.) Sometimes the cautioner binds himself simply as such, sometimes he is bound as full debtor, or conjointly and severally with the principal; and the same is the case where there are more cautioners than one. (Ibid.)

487. Where he is bound simply as such, the cautioner should expressly provide that the principal shall be discussed before any claim is made on him, otherwise he will not have the benefit of discussion. (19 and 20 Vict., c. 60, sec. 8.)

488. Where there are several sureties, each is liable only for his share of the debt, and cannot be called on by the creditor to pay more, unless in the case where, from the insolvency of one cautioner, the rest must contribute *pro rata* for his share. (Ersk. iii. 3. 63; 1 Bell's Com. 347, 5th ed.) Where a number of cautioners are bound as co-principals—i.e., as full debtors with the principal obligant—they have neither the benefit of discussion nor division, and consequently any one may be sued for the whole debt. (Ersk. iii. 3. 61; Ross' Lec. i. 78.)

489. The Court will allow policies of the British Guarantee Association to be lodged as bonds of caution by judicial factors. (Burnett, July 8, 1859.)

VI.—*Guardianship of Insane and Facile Persons.*

490. The sovereign, as *pater patriæ*, has always been recognised by the law of Scotland as guardian of the insane ; but this right is never exercised till the fact of insanity has been ascertained by legal process, and, except where the public interest is concerned, is always delegated to tutors or curators. (Balfour, p. 122, No. 107.) By the statute 1585, c. 18, the rule of the Roman law was adopted, and it was determined that the nearest male agnate of lawful age is the person entitled to the guardianship of his insane relative, in whatever form the insanity may be evinced.

491. It would seem that, in anticipation of insanity, a person may appoint a guardian to himself. (Fraser, ii., p. 315.)

492. The father is administrator-in-law for his children ; and should they become insane, and continue in this state after majority, he is still their guardian in preference to all others. (Ersk. i. 7. 50.) To entitle the father to act in this capacity after majority, however, the child must be cognosced. (Fraser, ii. 323.) Mr Bell is of opinion that the father possesses no power to name testamentary tutors to an insane person, to continue after majority. (Prin. sec. 2109.)

493. *Tutors-at-Law.*—The procedure in the appointment of tutors-at-law to the insane, which has remained unaltered for some centuries (Craig, 1. 12. 29), is as follows (Fraser, ii. 317, *et seq.*) :—

494. Any party having an interest may procure from Chancery a brieve, directed to the judge ordinary within whose jurisdiction the lunatic resides, ordaining him to summon an inquest consisting of fifteen persons, whose verdict is by a majority, for the purpose of cognoscing the party. The inquisition being for a public object, and taken on the king's precept, there is no necessity for any proper pursuer in the case. As the character

of the insanity may be doubtful, it is common to purchase both a brief of furiosity and a brief of idiotry, the jury being left to retour that under which the insanity properly falls.<sup>1</sup>

495. The first duty of the jury is to ascertain the state of mind of the person alleged to be insane; and, for this purpose, the best evidence, both medical and by acquaintances, must be laid before them. The members of the inquest may themselves be witnesses. It has been settled, by a judgment of the House of Lords, that in proof of insanity it is not competent to adduce evidence of the insanity of the relations of the party alleged to be insane. (*M'Adam or Walker v. M'Adam*, 1 Dow 177 (1806).)

496. The evidence may be taken by commission (*Fraser*, ii. 320); but the party must be produced to the jury, in order that they may judge of his condition from ocular inspection (*Ersk.* i. 7. 51.)

497. The jury next fixes the period at which the insanity commenced; and who is the nearest male agnate, and as such entitled to the guardianship. (*Ersk.* i. 7. 50.)

498. This provision of the statute (1585, c. 18) does not apply to the case of a wife, whose husband is her guardian at all times, and her tutor when cognosced to the exclusion of the nearest agnate. In such a case, the only object of cognition is to confer on the husband exclusive powers of management and coercion, which he does not possess as husband simply. (*Jardine v. Currie*, 8th July 1825; *Fraser*, ii. 323.)

499. Should the nearest agnate decline the office, the next agnate cannot accept it; and the only mode of remedying the

<sup>1</sup> The question put to the jury by the brieve of furiosity is the following:—*“Si sit incompos mentis, prodigus et furiosus, viz., qui nec tempus, nec modum impensarum habet, sed bona dilaceranda profundit;”* whilst that by the brief of idiotry is this,—*“Si sit incompos mentis, fatuus et naturaliter idiota, sic quod timetur de alienatione tam terrarum suarum quam aliarum rerum mobilium et immobilium.”*

defect is the appointment of a tutor dative or a curator *bonis* by the Court of Session. (Bryce v. Graham, 25th Jan. 1828.)

500. Tutors to the insane possess the same powers as tutors to pupils, and are subject to all the provisions of the Pupils Protection Act. (*Ante*, p. 90.)

501. Where the office terminates by the restoration of the lunatic to sanity, the fact of convalescence must be determined by a decree of the Court of Session, on an action of declarator of convalescence. (Bryce v. Graham, 25th Jan. 1828.) It has often been remarked, that if the question of insanity be a proper one to be submitted to a jury, that of sanity would seem also to fall within their province; but such is not the rule of the law of Scotland.

502. After a decree of convalescence has been pronounced, the Court cannot, though the person should relapse into insanity, authorize the tutor to resume the management without a new verdict. (Ederline's Tutor; Elch. *vide* Tutor, No. 12.)

503. The tutor is not entitled to resign office merely because there is a lucid interval. But, after a complete cure, the tutor may resign, and permit the person cognosced to resume the administration of his affairs, without any legal process being resorted to. In this case, however, the person who has been insane must take pains to preserve proof of sanity in any important transaction. (Bell's Prin. sec. 2111; but see Ersk. i. 7. 52, and Fraser, ii. p. 330.)

#### VII.—*Curators Bonis to the Insane appointed by the Court of Session.*

504. Should no person apply for the office of guardian in any of the forms just explained, it is competent for any of the next of kin to apply to the Junior Lord Ordinary of the Court of Session for the appointment of a *curator bonis*.

505. The petition for the appointment of a *curator bonis* must be served on the fatuous person himself. (Gordon v. Gunn, 30th

June and 22d Dec. 1832.) It must be accompanied by the certificate of a medical man, which must be on "soul and conscience," which is a sort of medical oath. (Campbell, 14th Jan. 1830.)

506. When the petition is opposed, the Court remit generally to the Sheriff of the county where the lunatic resides, to inquire into the grounds of the application, with power to examine medical and other witnesses, and to visit the individual himself, and state his own opinion. (Bryce v. Graham, 25th Jan. 1828, affirmed 23d July 1828, 3 W. and S., p. 323.)

507. On advising the proof and report, the Court will determine whether the appointment should be made or refused. (Dewar, 21st Jan. 1838.)

508. The curator *bonis* has no power over the person of the insane, his office being entirely confined to the management of the estate; and hence the advantages attending the appointment of a tutor dative. (Bryce v. Graham, 25th Jan. 1828; Robertson v. Elphinstone, 28th June 1814.)

509. When the fatuous person thinks himself recovered, there is here no necessity for raising an action of declarator of convalescence. It is sufficient to present a petition for the recall of the curatory; and, if this petition is opposed, the Lord Ordinary will remit to the Sheriff, as when the appointment is opposed. (Gordon v. Gunn, 30th June 1830.)

510. The office of *curator bonis* comes to a close by the service of the tutor-at-law; and it is competent for the fatuous person to present a petition for the recall of the curatory, which will be sustained on proof of recovery, no declarator of convalescence being requisite. (Fraser, ii. 334.)

511. Though the presumption of law is in favour of sanity till cognition has taken place, or a curator *bonis* been appointed, still deeds may be reduced on the ground of insanity, though there has been no cognition. All that is requisite for this purpose is, that the fact shall be clearly established during the course of an



action of reduction before the Court of Session. In practice, this fact is usually determined by the verdict of a jury.

### VIII.—*Interdiction.*

512. Idiocy and madness are the extremes of incapacity. Between them and sanity of mind there lie numberless degrees of imbecility and incapacity, and for these the law has provided protection by interdiction ; a proceeding, however, which is now very rarely resorted to.

513. Interdiction is of two kinds—voluntary and involuntary.

514. (1.) Voluntary interdiction is an arrangement which a person, conscious of his own imbecility, makes in order to protect him from the ruin which his improvidence would entail on him. (Fraser, ii. 337, *et seq.*)

515. Voluntary interdiction is imposed by the execution of a deed termed a bond of interdiction. It narrates, as shortly as possible, the cause of granting, declares the granter's confidence in the persons whom it nominates interdictors, and binds, obliges, and interdicts the granter, during the whole days of his life, from doing any deed alienating or contracting without their consent. Though the granter will be permitted to touch on his own weaknesses very slightly in the narrative of the deed, there must be a valid cause for the restraint in point of fact, otherwise the deed will be set aside. (Ersk. i. 7. 53 ; Stair, i. 6. 37 ; Stewart v. Hay, M. 7132 ; Braimer v. Innes, 13th Feb. 1789.)

516. Interdiction is completed by publication and registration in the public register of interdictions. (Ersk. i. 7. 56 ; 1581, c. 119 ; Fraser, ii. 340.)

517. (2.) *Judicial interdiction.*—This form is not adopted by the prodigus himself, but by his friends, who resort to it as the only means of protecting him when his defects are not of such a degree as would justify them in applying for a curator *bonis* on

the ground of insanity, or of having him cognosced as an idiot or a madman. (Stair, i. 6. 38 ; Fraser, ii. 341.)

518. It does not appear that any but relatives can competently raise an action of interdiction ; but a supreme judge, in the exercise of the nobile officium which he has inherited from the prætor, if he perceive, during the pendency of a suit, that either of the litigants is, from the facility of his temper, subject to be imposed on, will interdict him of his own accord. (Ersk. i. 7. 54.) There are, however, no recent instances of such a proceeding.

519. If appearance be made in the action of interdiction, the Court will proceed to proof of the character and disposition of the alleged prodigal, and determine according to its import. (Thomson, M. Ap., voce Interdiction, 1, and 5, sup., p. 488.)

520. Judicial interdiction must be published and registered in the same manner as voluntary interdiction. (Ersk. i. 7. 56.)

521. It is unnecessary to intimate the interdiction to the prodigal. (Ibid.)

522. The duties of the interdictors are rather of a negative than a positive character, and in this respect they differ essentially from those of administrators. Interdictors are not expected to get the prodigus to execute necessary or beneficial deeds. He is bound to see to that himself ; and their duty is simply to say, after he has brought the deed before them, whether or not they will adhibit their consent to it. The interdictors have thus no general management of the affairs of the interdicted person, and consequently have no accounts to render. (Stair, iv. 20. 30 ; Ersk. i. 7. 59 ; 1 Bell's Com. 140.)

523. Interdiction is further confined exclusively to heritage, and has no application to any deed by which the moveable estate may be affected. (Ersk. i. 7. 57 ; Stair, iv. 20. 33.)

524. Notwithstanding interdiction, the prodigus is moreover entitled to make a settlement of his heritable estate *mortis causa*,

in the same manner as the most unlimited proprietor. (*Mansfield v. Stuart*, 26th June 1841.)

525. Rational and onerous deeds, and deeds in consequence of which money has been profitably employed for the prodigus, will likewise be binding. (*Semple v. Noble*, M. 7145; A. B., M. 7149.)

526. As interdiction does not affect moveable property, it is competent, on the personal obligations of an interdicted person, to raise and execute all the diligence of the law, with the single exception of attaching his heritage. (*Fraser*, ii., p. 346, and cases given.)

527. An interdicted prodigus may vote at the election of a member of Parliament. (*Wight on Elections*, 268; *Fraser*, ii. 347.)

528. A judicial interdiction cannot be taken away otherwise than by the sentence of the Court which imposed it. (*Stair*, i. 6. 43; *Ersk.* i. 7. 55; *More's Notes*, p. 45.) Voluntary interdiction falls by the death of the interdictor (*Ersk.* *ibid.*; *More's Notes*, *ibid.*; *Hepburn v. Hepburn*, M. 7154); or the prodigus may recall it with the consent of his interdictors (*Ersk.* i. 7. 55; *Fraser*, ii. 350).

## CHAPTER IV.

### MASTER AND SERVANT.

529. The complete family, both in ancient and modern times, has been regarded as embracing the servants of the house; and service has thus generally been considered as belonging to the domestic relations. But so mercenary has the relation become in our own day, that the contract of service might, with equal propriety, be treated of under the head of letting and hiring.

530. Service is a contract whereby one person agrees to pay to another a certain sum of money for services, which the other agrees to render him for a definite period. In all free service there is an implied condition to the effect that the contract shall be voidable by either party, at any time, on payment to the other of the damages which his failure to implement it may have occasioned him. (Fraser, ii. 367; Manley Smith, p. 52.) The statutes mentioned below, under which artisans may be imprisoned for the violation of contracts of service, however useful in practice, seem scarcely defensible on any principle which would not justify slavery.

531. Every person of lawful age, and not subject to any natural or legal incapacity—that is, every person who is capable of contracting (*ante*, p. 4)—may be either a master or a servant.

532. A pupil cannot enter into a valid contract of service either as a master or a servant; and it is consequently necessary, when he contracts to serve, that either his father or his tutor should become bound for him. (Ersk. i. 7. 14.)

533. A minor may enter into the contract of service, in either capacity, without curators (Ersk. i. 7. 33; Campbell v. Baird, 13th Feb. 1827); but the contract of service, like other contracts, will be reducible by him on proving lesion; and if he have curators, or if his father be alive, a contract of service entered into by the minor, without consent, is null (Ersk. i. 7. 33; Stair, i. 6. 33; Low v. Henry, 14th Nov. 1797; Hume, 422).

534. A married woman in England, and probably with us (Manley Smith—Master and Servant—p. 3, and cases given), can hire domestic servants as her husband's representative; but she cannot become a servant to another without his consent; and should she attempt to do so, he is entitled to recover her person. (Fraser, ii. 369; Whyte v. Cuyler, 1 Esp. N. P. C. 200, 6 T. R. 176),

535. The contract of service may be entered into either verbally or by writing.

I.—*Verbal Contracts.*

536. A verbal contract of service can only endure for one year. (See Fraser, ii. 370; Caddell v. Sinclair, M. 12416; Dale v. Dumbarton Glass Co., 5th Feb. 1829.)

537. A verbal contract of service for more years than one is not effectual even for the usual term, unless it has been partially implemented. (Paterson v. Edington, 17th June 1830.)

538. It is complete when the parties are agreed as to the hire, the duration, and the nature of the service.

539. It may be proved by witnesses. (Fraser, ut supra, and cases cited.)

540. It lies with the party who seeks to enforce the contract to prove its terms. Here, however, as in other cases, the onus probandi may be shifted by the particular circumstances of the case. (Forbes v. Milne, 17th Nov. 1827; Thomson v. Isat, 18th May 1831.)

541. If it be agreed that a contract of service for one year shall be reduced to writing, the contract is incomplete till the writing be executed, and either party is entitled to resile. But if the service has been entered on, the contract will be effectual for the period, and on the conditions usual in the particular employment, though no writing should ever follow. (Caddell v. Sinclair, M. 12416; Paterson, June 17, 1830.)

II.—*Written Contract.*

542. If the contract of service is to endure for more than one year, it must be reduced to writing. In this respect it stands on the same footing with the contract of lease. (Paterson v. Edington, 17th June 1830; Kennedy v. Young, 13th March 1837.)

543. By 55 Geo. III., c. 184, any memorandum or agreement

for the hire of any labourer, artificer, manufacturer, or menial servant, is exempt from stamp duty.

544. The writing must consist either of a probative deed, or of the interchange of holograph writings between the parties. (Paterson v. Edington, *ut supra*.)

545. Defects in the legal solemnities cannot be supplied by a reference to the oath of the party who is attempting to invalidate the contract; but they may by proof (either by reference to oath or otherwise) of what is called *rei interventus*,—that is to say, of any transaction between the parties which has taken place in consequence and on the faith of the contract. (As to what constitutes *rei interventus*, see Fraser, ii. 373, *et seq.*)

546. *Earnest*, or *arles*, is a sum of money given by the master to the servant, in token that the contract is complete. Such earnest is not necessary to constitute the contract, except by force of an uniform and notorious local custom; and even though given, it will not constitute *rei interventus* (Fraser, ii. 376), so as to validate a contract otherwise defective. Its only value is, therefore, as an adminicle of proof.

### III.—*Implied Contract.*

547. Where the contract has expired, and the relation between the parties continues unchanged, they are held to have renewed the contract by tacit consent or relocation, without any new engagement being entered into. This presumption, however, will be removed, should the local custom require express renewal, as is said to be the case in the border counties.

548. When one near relative discharges the duties of a servant to another for a considerable time, wages will sometimes be held to be due, even though there should have been no special agreement to that effect; but such cases depend entirely on the special circumstances of the parties, and no general rule can be laid down regarding them. It has sometimes been held that

there is a presumption in favour of the service being for wages; but the prevailing doctrine in Scotland seems to be, that there is no presumption either way. It is, in short, a question depending on the fact of whether or not the party was a servant. (*Shepherd v. Meldrum*, 23d Jan. 1812; *Anderson v. Halley*, June 11, 1847; *Ritchie v. Fergusson*, Nov. 16, 1849; *Boyer* (House of Lords), March 6, 1822, Hume, p. 394; *M'Naughton v. M'Naughton*, Hume, p. 396; *Smellie v. Gillespie*, 19th July 1834; *Adam v. Peter*, 3d Feb. 1842.)

#### IV.—*Duration of the Contract.*

549. There is no illegality in a contract of service extending over many years, or even possibly for life. (*Grot. de jure bell.* ii. 5. 27; *Ersk.* i. 7, 62; *Hutchison, Justin.*, ii. 161; *Fairil v. M'Vicar*, 2 *Hutch.*, p. 168, note; *Bell's Prin.* 174.) Such a contract, having inherent in it the condition that it is voidable by either party on the payment of the pecuniary damages which his non-implement may have occasioned, has, in reality, nothing more of the character of slavery than an agreement to serve for a month or a year.

550. When the period of duration is not expressly mentioned at the hiring, the law, proceeding on the presumed intention of the parties, adopts the customary term of engagement in that particular line of service and district of the country. The circumstance of wages having been rated at so much a year, will not overcome the presumption that the engagement was for half a year, or whatever else may be the ordinary period. (*Bell's Prin.* 174.)

551. *Domestic Servants.*—In Scotland, the presumption in the case of domestic servants would probably still be held to be in favour of a six months' engagement (*Hume's Decisions*, p. 393; *Bell's Prin.*, sec. 174; *Fraser*, 385); but the English practice of hiring from month to month, which has been recently adopted by

many families, would render the presumption more easily overcome by contrary proof than it would formerly have been. (Manley Smith's *Master and Servant*, p. 52.)

552. *Rural Servants*.—Farm servants and gardeners are presumed to be hired for a year, because their occupations depend on the revolutions of the seasons, and one part of the year is a time of labour, and the other the reverse. (Hume's *Decisions*, p. 393; Bell's *Prin.* 174; Manley Smith, p. 52.)

553. *Overseers, Managers, etc.*—In the case of all persons of a superior station, the presumption will be for a year's duration, as it is not likely that they would accept situations from which they might be dismissed, at the pleasure of their superiors, at a moment's notice. (*Finlayson v. M'Kenzie*, 6th June 1829.)

554. *Tutors, Governesses, and Clerks*.—The general presumption in favour of a yearly engagement would seem to be less strong in the case of these parties than in that of stewards, grieves, or overseers; and, from the intimate personal contact which, in such situations, must take place between the employer and employed, there is much convenience to both parties in the contract being dissolvable at the pleasure of either. In the absence of all evidence as to custom, either of the country generally or of the parties, the contract being in its own nature one of some duration, would probably be held to endure for a year. (*Moffat v. Sheddon*, Feb. 8, 1839; Bell's *Prin.* 174; Stephen's *Com.* ii., 240; Manley Smith, 52.)

555. *Managers of Banks, and Editors of Newspapers*.—The practice applicable to this class of servants does not seem to have been so uniform as to give foundation for any presumption, and questions arising between them and their employers would at once be remitted to proof. (Fraser, ii., p. 387; Manley Smith, p. 53), gives some indication of the English custom.

556. *Engagement during pleasure*.—Wherever there is an en-



gagement of this nature, the servant may be dismissed at any time, without the employer being bound to assign any reason for his act. (*Mitchell v. Western Bank*, 26th Jan. 1836.) Where employment is by the piece, the workman's connection with his employer is terminated by the completion of his task, unless usage or agreement to the contrary is proved.

557. *Terms of Entry*.—These for domestic and rural servants are generally Whitsunday and Martinmas, old or new style, according to local custom. The contract terminates by the same style by which it begins.

558. *Obligations of the Servant*.—The servant is bound to enter the service at the term agreed on. He cannot compel the master to accept a substitute, seeing that a preference of the particular person hired—*a delectus personæ*—is of the essence of the contract. (*Campbell v. Price*, 13th Jan. 1831.)

559. The servant is bound to continue in the service for the time specified. If he quits it, the master may refuse to take him back, and may claim damages for breach of contract. (*Fraser*, ii. 418.) In some cases he may insist for specific implement by the compulsitor of imprisonment. (*Fraser*, ii. 389, *et seq.*; *Raeburn v. Reid*, June 4, 1824; *Gentle v. M'Millan*, 9th July 1829; but see *Tulk v. Anderson*, June 1, 1843.)

560. It had been decided previously to the passing of the workman's statute, that a workman, mechanic, or artisan, who, after having entered to his service, deserts or leaves it, without giving the stipulated notice, may be compelled, by imprisonment, to find caution to return to his service and continue therein. (Authorities for previous section.) The ground on which the Court enforced against a servant in breach of contract, a remedy which they would not have given the servant against his master if the latter had violated the engagement, was that, by the sudden desertion of workmen and apprentices, the owners of large establishments might sustain enormous losses, not to be

compensated by any damages which they could possibly recover from their servants.

561. The soundness of the decisions on this point have been doubted on very high authority, and, except as regards cases falling within the provisions of the workman's statute (4 Geo. IV., c. 34), it seems doubtful whether the compulsitor of imprisonment can be legally applied. So strongly, indeed, have the difficulties of the subject been felt, that, in 1846, a consultation of the whole Court was actually ordered; but the case (*Lees v. the Grangemouth Coal Co.*, 26th Feb. 1846, *Jurist*, p. 273) in which the point had arisen was, unfortunately, taken out of Court by a compromise.

562. It has never been held that the contract of service can be enforced by imprisonment against a domestic servant; and the principle on which the rule was introduced seems to exclude from its operation all but artificers, colliers, and the like. It has not even been applied to professional men, clerks, artists, authors, and overseers, though it is very possible that the loss occasioned by their failure to implement their contracts might exceed their ability to pay damages. (*Paterson v. Edington*, 17th June 1830; *Bootless v. Normand*, 20th Nov. 1832.) It has been expressly decided that domestic servants are not affected by the workman's statute (*Normant v. Wilson*, 25th Jan. 1845, 2 *Brown's Justiciary Reports* 375), the provisions of which will be stated when we come to speak of the statute law affecting mechanics and artisans. (*Infra.*) It will be sufficient to observe, in the meantime, that it has not superseded procedure at common law.

V.—*Exceptions to the Obligations on the Servant to enter and continue in the Service, or on the Master to retain him.*

563. *Enlistment.*—It is provided by the Annual Mutiny Act (21 and 22 Vict., c. 9), that if servants enlist, their masters

have no right to have them restored. It is, besides, lawful for a justice of the peace to adjudge to a recruit a reasonable proportion of his wages for the time he has actually served; and, in case of neglect or refusal to pay the same within four days, he is empowered to issue a warrant for levying the same, by sale of the goods and chattels of the master. (*Ib.*, sec. 64.)

564. *Marriage of Female Servant.*—It is the general opinion of lawyers in Scotland, that a female servant who marries is entitled to quit the service—her husband, not her master, being entitled to her person. In this case, however, the master will have a claim for moderate damages, though whether or not this claim would be valid against her husband, is yet undecided. (Bell's Prin., p. 71, sec. 181.) On principle, the liability of the husband is clear; marriage is as much his act as the wife's. The marriage of a servant is no ground of dismissal, if he or she be content to serve, and does actually serve, as formerly. (Fraser, ii. 398.)

565. *Sickness.*—If the sickness be caused by a hurt sustained whilst engaged in the master's service—*e.g.*, by a kick from his horse, or the bursting of his fowling-piece—the servant is entitled to full wages, and if he lived in the family, to board wages up to the period of the termination of the contract. (Bell's Prin. 180.)

566. If the master offer to maintain the servant in his own house, the servant, in the general case, is not entitled to leave, and claim board wages; but, if it be found necessary for the servant's recovery that he should be removed, the master must pay board wages. (2 Hutch. Just. 167; Fraser, ii. 398.) If the servant's sickness has arisen from overtasking, the same principles are applicable.

567. The servant will not be entitled to wages after the term of his engagement, though the effect of the injury continue after that period. Any further claim he may have against the master,

on the ground of improper exposure to danger or otherwise, will resolve itself into an ordinary claim for damages.

568. If the sickness be referable to no cause which the master could possibly have controlled, the rule is, that wages and board wages will be due only where the illness is of moderate duration; and a deduction from these will be made if the length of the sickness be very great, considered in relation to the length of the engagement. (2 Hutch., p. 166; Bell's Prin., sec. 180; Fraser, ii. 399; Stephens Com. ii., 243; Manley Smith, p. 85.)

569. It has not been laid down by any of the authorities what shall be considered a short, a long, or a moderate period of sickness. Such questions of degree admit of no precise rule; and, if they cannot be solved by the good sense and good feeling of the parties, must be left to the discretion of the Court. (Fac. Col., Nov. 29, 1794; White, M. 10147; Maclean v. Fife, 4th Feb. 1813, F. C.; Manley Smith, p. 85.)

570. Where a substitute has been required, the sum paid to him will furnish some guidance for determining the deduction to be made from the wages of the servant.

571. *Sickness caused by the servant's own misconduct, debauchery, or imprudence*, will entitle the master to dismiss him during the period of the engagement. Here the case is the same as if the servant had been guilty of a breach of contract, and he cannot in any case exact more wages than for the period during which he has fulfilled it. He cannot compel the master to keep him useless in his service, or to board him in his house, even should he be willing to forego wages. (Lord Eldon in Simmons v. Wilmot, 3 Esp. 91.)

572. In like manner, where the sickness had begun and was known to the servant, but concealed from the master, at the date of entering into the contract, wages will be due only for the time he has actually served. There is an implied warranty in the contract, that the servant has the physical capacity to fulfil it.

(Fraser, ii. 401.) This rule, however, will not entitle the master to resile from the contract merely because the strength of the servant proves inferior to his expectations. The only case in which it will operate is where there has been fraudulent concealment of disease, *e.g.*, that the servant is subject to epilepsy.

573. Workmen earning weekly wages, and not residing in the master's house, have no claim against the master if they have been disabled by sickness from discharging duty. Neither does such exist in the case of any other class of servants, if their engagement is liable to come to an end on a moment's warning.

574. Where mechanics or artisans are engaged for a lengthened period, they will probably be found to have the same claim to wages during sickness of moderate duration as domestic servants, though not of course to board wages. (Fraser, ii. 401.)

575. *Insanity*, being only another form of sickness, is governed in the case of the servant by the same principles. Where the master is a lunatic, it has been decided in England that he is liable to pay for any services which had been rendered to him, provided they were such as might reasonably be considered necessary for a person in his station of life. (Baxter v. Earl of Portsmouth, 5 B. and C. 170 ; Manley Smith, p. 9.)

576. Where the parties stipulate that for every absent day the servant shall serve two, this stipulation will be held to have no reference to days on which the servant is sick. (Fraser, *ut sup.*)

577. *Imprisonment*.—When the servant is carried away to prison for a crime of which he is found guilty, or for a debt which is found to be unpaid, then, as the contract was broken by his voluntary act, he is liable in damages, and the master is free from the contract. If, on the other hand, he be imprisoned on suspicion of being guilty of a crime of which he is ultimately acquitted, he is not liable in reparation ; and the master is bound by the contract, because there was no voluntary breach of en-

gagement. (Bell's Prin., sec. 182 ; Fraser, *ut supra*, and English cases cited.)

578. *Death of Servant*.—If the servant die before the term be elapsed, wages are due to his heirs only for the time he actually served. (Ersk. iii. 3. 16 ; Bank. iii. 20 ; Bell's Prin., sec. 180.)

579. *Death of Master*.—If the master die, or without good reason turn off a servant before the term be elapsed, he will be entitled to his full wages, and to board wages, if he had bed and board in the family. (Ib. ; see *infra*, Termination of Contract.)

580. *Skill and Care*.—The servant is bound to exercise ordinary skill and assiduity ; the amount of each depending, of course, on the nature of the occupation.

581. If the service is one calling for what is more strictly denominated skilled labour, he will be liable in such damages as his want of ordinary ability in the craft to which it belongs may have occasioned. Thus, if a farrier undertake the cure of a diseased or lame horse, and if the horse die through his ignorance, he is liable for the loss. (Bell's Prin. 148. 9 ; Burnet v. Clark, M. 8491.)

582. In like manner, if the service calls for unusual assiduity, he will be held to have promised it by undertaking the duty. Thus, a person who undertakes to act as a sick-nurse, will be liable in damages, though his assiduity may have been such as would have been highly creditable in a valet.

583. So also in the case of a person employed to work on materials of unusual value. A person employed to clean a jewel is liable in greater diligence and care than he who has undertaken to mend a cart. (1 Bell's Com. 459 ; Prin., sec. 152.)

584. The same is the case with ordinary servants of every description.

585. If a person who hires himself as a cook is unable to perform the duties of such a situation, the contract is not binding

on the master (Ersk. iii. 3. 16.; Bell's Prin. 155); and so with regard to any other servant, whether male or female, domestic, agricultural, or manufacturing. But if, at the time of hiring, the servant acknowledged that he was imperfectly qualified for the office, and honestly let the master know his defects, the latter is not entitled to repudiate the contract, although the servant does not display the usual skill of a servant hired for the place which he fills. (*Gunn v. Ramsay*, 3d June 1801.) In such a case, the servant is only bound to exercise the skill and judgment which he possesses. (Bell's Prin., sec. 154.)

586. A servant must be careful of his master's property; and the master will be justified in dismissing him, not only for wasting it without cause, but for entertaining his friends with it, or even for giving it away in charity. (*Cunningham v. Fonblanque*, 4 C. and P. 49.)

587. In such a case, a master would further be entitled to deduct from the wages of the servant a sum equivalent to the damage which his misconduct had occasioned. (Ersk. iii. 3. 16.)

588. If a servant wantonly maim a horse, or override him, or otherwise disable him, he is liable to his master for the damage which he occasioned, and in some cases may be dismissed. (Fraser, ii. 403; Ersk., *ut supra*.)

589. In short, negligence of all sorts is a breach of contract, and, consequently a ground of dismissal and forfeiture of wages, though the rule is one which must not be applied on trifling occasions or for trivial faults. Delay to open the door would not be a sufficient ground for dismissing a footman, unless obstinately persevered in in defiance of orders. (Manley Smith, p. 79, *et seq.*)

590. *The servant is not liable for every damage that may be done by him.*—If ordinary care and diligence have been employed, a maid-servant would not be liable though some of the dishes belonging to her mistress had been broken in her hands. Servants

cannot be entirely perfect; and unless the damage has arisen from absolute carelessness or rashness, the master must bear the loss of his property as one of the inconveniences of hiring servants. (1 Bell's Com. 458; Fraser, ii. 404.) Still less is the servant responsible for damage which is the result of accident, or of the fault of another.

591. If a servant is robbed of his master's property, he is not liable for it; for he only contracts for his own diligence and fidelity, not for the honesty of others, or his own strength and courage. (Walker v. Guarantee Association, 18 Q. B., 277; Manley Smith, p. 73; Bacon's Abridgment; voce Master and Servant.)

592. If a servant rob his master, the latter is entitled to dismiss him without warning, or wages even for the period for which he has served, and will also have an action for damages against him, which will not be affected by any punishment which he may suffer as the result of a criminal prosecution. (Cunningham v. Fónblanque, 6 C. and P. 49; Manley Smith, 73.)

593. *The servant must be respectful.*—There is no offence which courts of law have been so uniform in holding to be a valid ground of dismissal as insolence. (Fraser, ii. 404 and 418.) Were it not so, the distinction between master and servant must either be lost or preserved by acts of personal chastisement, which modern law does not permit.

594. This rule extends to the relation between a tradesman and his journeymen or shop boys, though a speech, which might justly be deemed insolent when coming from a menial servant to his master, will often admit of a different construction when addressed to a tradesman by a servant who scarcely differs from him in social position. (Tait's Just., voce Servant; Fraser, ii. 405; as to workmen, see 4 Geo. IV., c. 34.) A slighter amount of disrespect will entitle a master to dismiss his journeyman, if it has taken place in the presence of other journeymen or apprentices.



(*Handyside v. Arthur*, 7th Feb. 1787, Arniston Pap.; and *Fraser, ut supra.*) An angry word spoken under provocation, or a disrespectful expression or action, if fully apologized for, will not, unless of a very flagrant character, be sufficient to sanction the dissolution of the contract.

595. *Servant must be obedient.*—Disobedience is a breach of contract which clearly warrants dismissal. (*Hume's Dec.* 392; *Spain v. Arnot*, 2 Stark 256; *Manley Smith*, p. 77.)

596. The master is in no case bound to assign any reason for a command which is lawful in itself, and within the fair meaning of the contract; and it is an act of disobedience on the servant's part to insist for such reasons before performing what he is commanded. (2 Hutch. 168; *Fraser*, ii. 406 and 408.)

597. The master is entitled to control the hours of dining (*Spain v. Arnot, ut supra*; *Callo v. Brouncker*, 4 C. and P. 518; *Turner v. Mason*, 14 M. and W. 112; *Amor v. Fearon*, 4 C. and P. 518, *Manley Smith, ut supra*), sleeping, church-going, and the like, of his servants; and any violation of his instructions in these respects, unless they were in the highest degree unreasonable, would be an act of disobedience, exposing the servant to the penalty of dismissal.

598. A female servant having fallen sick, her master administered calomel to her on a Sunday, and commanded her to stay at home. Notwithstanding this, she went to church, on the ground that, by the custom of the place, she was entitled to that day as her "Sunday out." The master dismissed her; and the Court held him entitled to do so, on the ground that the servant had been guilty of disobedience to a lawful order of her master. (*Hamilton v. M'Lean*, Dec. 9, 1824.) In another case a master was held justified in dismissing a labouring hind for refusing to remain at home on a Sunday to attend to the cattle, so as to enable the other servants to go to church, he having been previously

allowed to attend the Sacrament in his own church. (*Wilson v. Simson*, July 11, 1844; *Turner v. Mason*, 14 M. and W. 112.)

599. A coachman was saucy in his behaviour to his master, and on one occasion remained out late, and was locked out in consequence. The master went to inform him that he could not be admitted at such an hour; but the servant answered that he would not be kept out, and shoved his master violently aside. Having thus made good his entry, he was rude and insolent. The master dismissed him immediately; and the Court not only found him justified in doing so, but allowed no wages for past time. (*Elder v. Bennet*, Hume 386, 9th March 1802.) Where, on the other hand, a servant absented himself half an hour beyond the proper time on Sunday, this was not held a sufficient ground for dismissal. (*Wright v. Gibson*, 3 Car. and Pay. 583.) Thus, also, a gardener being absent one day without leave, and this being his first offence, the Court held it not sufficient to justify dismissal, and found the master liable in wages. (*Thomson v. Douglas*, Hume 392.) But a head gardener, who was absent for four days, was not found entitled to wages. (*Reid v. Crawford*, Hume 398; reversed 13th May 1822, 1 St. Ap. 124.)

600. The servant is entitled to a limited time in order to look out for another place, after warning has been given him that he is not to be retained. The extent of absence which such a cause will justify can be determined only by local custom and the reason of the case.

601. *Drunkenness*.—A single instance of drunkenness, if of an aggravated character, will justify the dismissal of a domestic servant. (*Edwards v. Mackie*, Nov. 14, 1848; *Speck v. Philips*, 5 M. and W. 279; *Wise v. Wilson*, 1 C. and K. 662; *Manley Smith*, 79 and 81.

602. A master of a ship having been dismissed for drunkenness, and reinstated on condition of having no spirits on board, violated the condition, and was repeatedly drunk during the

homeward voyage—*Held* that he thereby forfeited his wages from the time at which he violated the agreement, although the ship arrived safely. (M'Kellar, Dec. 15, 1852.)

603. *Hours of Labour.*—Where no special agreement has been entered into on the point, the servant is bound to labour during all the hours of the day which the usage of the place sanctions, or which are in themselves reasonable, considering the kind of labour he has undertaken to perform. (Fraser, ii. 409.)

604. As regards domestic servants, the only limitation to their hours of labour is, that they must be allowed a reasonable time for sleep, and must not be taxed beyond their strength. (Ib.)

605. Farm servants, again, are bound to labour only during the usual hours of a working day, but they are not entitled to refuse to extend these when necessity requires. (Wilson v. Simson, July 11, 1844; Manley Smith, p. 78.) Even clerks and artisans, with whom there is generally a special agreement to work so many hours, would not be justified in refusing, on a special emergency, to work an hour or two longer. (R. v. St John Devizer, 9 B. and C. 900.)

606. *Holidays.*—In parts of the country where the practice of giving particular holidays is uniform and notorious, the master will be presumed to be acquainted with the usage, and to have acquiesced in it, and the servant will not be liable to dismissal though he have taken such a day without leave. (Morison v. AHardyce, 27th June 1823; but see sec. 598.)

607. No servant is bound to work on Sunday unless his labour come within the line of works of "necessity and mercy." (1579, c. 70.) Under this head fall the ordinary duties of domestic servants and also of farm servants, to the extent of attending to cattle and horses. The servants of apothecaries, dressers in hospitals, and the like, fall of course under the same rule. It was decided by the House of Lords, on appeal, reversing the judgment of the Second Division, that a barber's apprentice is

not bound to shave his master's customers on Sunday morning. (*Philips v. Juner*, 20th Feb. 1837, 2 S. and M'L. 465.)

608. *Kind of Work*.—There are no questions which more frequently arise under the contract of service, than questions as to whether or not the work enjoined belongs to the kind of work contracted for, and there are none so difficult to settle. Where shall the line be drawn between the obstinacy and fastidiousness of the servant on the one hand, and the unjustifiable exactions of the master on the other?

609. The general rule is, that although the work demanded from the servant may not be within the precise line of his agreement, yet if it be asked at a time of emergency, his scruples to do it will not be listened to. (*Bell's Prin.*, sec. 177; *Fraser*, ii. c. 411.)

610. But if the deviation be great or often repeated, or if there be personal danger to the servant from want of skill, a court of law will interfere to protect him from this breach of contract on the master's part. (2 *Hutch.* 170; *Bell*, *ut supra*.)

611. No servant is bound to work at a lower class of duties than that for which he was hired: a tutor cannot be compelled to act as a butler, nor a butler as a footman; a gardener cannot be forced to work in a turnip field (*Thomson v. Douglas*, *Hume*, 392), nor can a grieve or overseer of a coal-work be compelled to assist at the windlass-wheel. (*Fairie v. M'Vicar*, 2 *Hutch.*, 168 note.). Even where no indignity or hardship is inflicted, a breach of contract will not be permitted. A housemaid, for example, cannot be compelled permanently to undertake the duties of a cook or lady's maid, though she would certainly be bound to render occasional assistance to the cook or lady's maid, or even to do their duties during an accidental or temporary absence. (*Fraser*, ii. 411.)

612. In the case of a servant of all work, there is no room for such nice distinctions, and she cannot object to do any duty incumbent on a menial servant.

613. In like manner, servants in husbandry must perform any part of the labour of the farm which their master points out to them, and are not entitled to select what is most suitable to their respective capacities or inclinations. (Fraser, ii. 412.)

614. *Servants' Conduct must be Decent.*—It has been decided as regards all classes of domestic servants, including tutors, governesses, and secretaries, that if they have been guilty of lewdness they have broken the contract. (Ib.)

615. If a man-servant debauches a female servant, both may be dismissed. (2 Hutch. 169; Ashover v. Brampton, Cald. 11, 208. 14; Aitken v. Acton, 4 C. and P. 208.)

616. It is not necessary, to justify dismissal, that the servant be with child; it is enough if she introduces men into the house and sleeps with them. (Fraser, ii. 412.)

617. Improper conduct out of the master's house will be a ground of dismissal, if it can be shown to be prejudicial to the master, and hurtful to the feelings or reputation of himself or his family. (See Gunn v. Goodall, 13 S. 1142.)

618. Improper conduct previous to entering the service will not furnish a ground for dismissal. (De Grosberg, M. 16456.)

619. Indecent conduct, though not amounting to positive immorality, and obscene or blasphemous conversation, if persevered in by the servant, after remonstrance by the master, is a good ground of dismissal. A tutor who had used obscene language to the children whom he taught, was held to have been justifiably dismissed, and his salary was declared to be forfeited. (Matheson v. M'Kinnon, 4th June 1832.)

620. *Family Secrets.*—Maliciously spreading defamatory reports, or disclosing family secrets, to the prejudice of the master or his family, will justify the dismissal of a servant. (Beeston v. Colyer, 2 C. and P. 609.)

621. *Trade Secrets.*—It is not uncommon in manufactures for the master to be possessed of a method, or "trick," unknown to

other tradesmen, and on which his superiority and fortune depend. The servant, at hiring, is usually bound to secrecy on this subject; and if he reveal anything on which he has promised to be silent, he may not only be dismissed, but will be liable in damages. (*Rutherford v. Boak*. 19th Mar. 1836, Jury Sittings.)

622. *The Servant's Earnings belong to the Master.*—During the hours of work, which, in the case of domestic servants, includes all hours not devoted to necessary rest, the servant's time and labour belong to the master. If, therefore, the servant, while hired exclusively to one person, should, without his employer's consent, hire himself to another, all his earnings belong, in strictness, to the first employer. "Whatever difficulty," said Lord Ellenborough, "there might be in the master's recovering the earnings of his servants, it seems established that he may retain them when paid into his hands, as he is equitably entitled to them, and his right can least of all be controverted by his servant. The point has been decided in the case of a master of a ship who had given a part of his personal services to one who was not the owner." (1 Campb. 529.)

623. A clerk, or servant, may legally inform his master's customers that he is about to commence business on his own account, and solicit their future patronage. (*Nicol v. Martin*, 2 Esp. 732.)

624. *Inventions* by a servant belong to him, unless there is a contract between him and his employer, providing either expressly, or by necessary implication, that inventions by the servant in the course of his service should belong to the master. (*Broxam v. Elsn*, 1 C. and P. 558.)

625. *The Servant is bound to accompany the Master.*—Where the service has relation to the person more than to the place, the servant, as a general rule, is bound to attend the master wherever he goes. The obligation which thus lies on domestic

servants of all ranks does not exist in the case of a ploughman hired to labour a certain farm, or a workman engaged to work in a particular factory.

626. Even as regards the former class the rule is not without exception. No servant is bound to go to a foreign country, seeing that he is there beyond the protection of British law, and in circumstances, it may be, very different from those under which he would have lived at home. (Bell's Prin., sec. 182.) Whether England or Ireland would now be held to be foreign countries to this effect, we must, in opposition to the high authority of Mr Bell, regard as more than doubtful; the more so that our law of master and servant scarcely differs from that of England.

627. In case of the servant being carried to England or Ireland, or even to a distant part of Scotland, he would probably be found entitled to the expenses of his journey in returning at the termination of his engagement. (Fraser, ii. 417.) Were he dismissed for misconduct, the reverse would probably be the case, as the master might possibly have returned and carried him along with him, before the termination of the engagement.

628. *Admonition.*—Where the offence has been slight, though belonging to the class of offences which warrant dismissal, the master is bound, in the first instance, to try the effects of admonition. If this be slighted, repetition of a very small offence will constitute a grave transgression. (Bell's Prin., sec. 183; 2 Hutch. 167; Fraser, *ut supra*.)

629. *Wages due on Dismissal.*—The general rule is, that righteous dismissal infers forfeiture of wages. But this rule is one which cannot always be applied with strictness, and the courts have generally been guided by the following principles:—Where the cause of dismissal, though sufficient, is light, the servant will be entitled to wages during the time he has served, or part thereof. (Robinson v. Headman, 3 Esp. 235; Taylor v.

Guthrie, Hume 382; Learmonth v. Blackie, 13th Feb. 1828; Wilson v. Simson, 11th July 1844.) On the other hand, if it has been grave—such, for example, as an attempt on the part of a man-servant to debauch a woman-servant, or even deliberate and insolent disobedience to a lawful order—the wages, both past and future, will be forfeited. (Atkin v. Acton, 4 Car. and P. 208; Turner v. Robinson, 6 Car. and P. 15; Silvie v. Stewart, 3d July 1830; Matheson v. M'Kinnon, 4th June 1832.) Again, the circumstances may be such as to sanction leniency to the extent of finding wages due for the whole period of the contract, refusing only board wages. (Gibson v. Pentland, 12th Nov. 1793, reported from Sess. Pap.; Fraser, ii. 408.) A case in which board wages also were given would scarcely be one for dismissal.

630. A fault, in order to form a bar to wages, must be mentioned at the time; and the master will not be held entitled to allow the service to be completed, and at the end of it to plead a breach of contract as a defence to the servant's claim for wages. (Fraser, p. 423.)

631. *Forcible Ejection*.—If a servant, when discharged, refuse to quit his master's premises, the master is perfectly justified in turning him out by force. (Donaldson v. Williams, 1 Cr. and M. 345.) But in most cases, for obvious reasons, it will be more prudent to call in the aid of a constable or policeman. (Manley Smith, 77.)

632. The master is at all times entitled to dismiss the servant, and to insist on his departure, on paying wages and board wages. (Cooper, 5th March 1825; Ersk. iii. 3. 17, note 117.)

## VI.—*Obligations of the Master.*

633. The master is bound to receive the servant, and to allow him to continue in his service till the termination of the contract. (Bell's Prin., sec. 183.) He is bound to protect him, and treat him with patience and moderation; and if intemperate language



or threats of personal violence be habitually used to him, and, still more, if he be treated with such severity as to destroy his happiness or comfort, a court of law will find him entitled to leave the service, and to sue for wages, and in extreme cases for damages. Even the wanton imposition of unnecessary labour, if carried to a great extent, would be held to be a violation of the contract by the master (Ersk. i. 7. 62); but it is impossible to assign the point at which the master's judgment would no longer be regarded as the measure of what was necessary or reasonable. Every case of this kind must be determined on its own specialties, and no one decision can form a precedent for another.

634. *Personal Chastisement*.—It was the opinion of Blackstone, and seems to be consistent with our law, that a master may correct an apprentice or very young servant, more especially a male servant, provided it be done with moderation; but if the master or master's wife beats any servant of full age, it is a good cause of departure. (Stephen's Comm. ii. 243; 2 Kent Comm. 211; Manley Smith, p. 76; 2 Hutch. 170.)

635. *Attempting the Honour of a Female*.—A female servant is entitled to leave her master's service if he has attempted her honour. In such a case the master will be liable for wages and board wages for the whole period of the engagement, and not unfrequently in damages also. (M'Lean v. Miller, 14th May 1832; Fraser, ii. 425.)

636. *Falsely accusing Servant of Dishonesty*.—If the master should fail in proving a charge of dishonesty against the servant, the latter will be entitled to quit the service, and to claim wages and board wages for a period which will be regulated by the circumstances of the case. (Longmuir v. Thomson, 16th March 1833.)

637. *Food and Lodging*.—The master is bound to supply domestic servants with wholesome food and lodging, suitable to their condition. (Bell's Prin. 183.) But even where a particular

kind of food has been promised, the master will not be bound to furnish it, or pay the full value, if, from unforeseen circumstances, it has risen to an extravagant price. (*Wilkie v. Bethune*, Nov. 23, 1848.)

638. The master may compel a male servant to reside out of his house on paying for his lodging, but not a female servant, because it is implied in her contract that she shall have the protection of her master's house and family. (*Bell's Prin.* 184; *Graham v. Thomson*, 12th Feb. 1822.)

639. *Medical Attendance.*—There has been no decision of the Supreme Court in Scotland as to the liability of the master to furnish medical attendance; and, in cases of ordinary sickness, not arising from the service, and over which he had no control, the leaning of lawyers has been to the effect that he would not be liable. In England it may now be considered as established law, that a master is not bound to provide medical advice for his servants, and that it makes no difference whether or not the servant be living under the master's roof. The liability lies against the parish officer; an arrangement which is conceived to be more for the advantage of servants, from there being many masters not in such a position as to enable them to afford sufficient assistance in cases of serious illness. (*Wennall v. Adney*, 3 B. and P. 247, the first decision *in banc* on the subject; *Manley Smith*, p. 131, where the cases are given.)

640. Where the illness has arisen from a hurt sustained in the service, and the master has sent his own medical attendant, he may be held to have undertaken the care of the servant in that illness, and be liable for the bill of *another* medical man, though in general he will not be bound to pay for one whom the servant has selected without his knowledge, and continues to employ without his consent. (*Manley Smith*, *ut supra*.)

641. *In what case is the Master liable for Injuries sustained by a Servant in the discharge of his duty?*

642. The master must conduct his business in such a manner as not recklessly to endanger the lives of his servants; and if he act rashly, and injury follow in consequence, he will be liable to damages.

643. In order to entitle the servant to damages, however, it is necessary that positive misconduct be brought home to the master. (*Sellen and Wife v. Norman*, *Carrington and Payne's Reports*, vol. iv., p. 80; and *Cooper v. Philips*, p. 581.)

644. Where a servant was injured by the breaking down of a carriage, in consequence of a defect of which the master was not aware, he was not bound to make reparation, because "he is not responsible for the negligence of his coach-maker or harness-maker." The master's obligation is discharged when he has provided for the safety of his servant "according to the best of his judgment, information, and belief." (*Priestly v. Fowler*, iii.; *Meason and Wilsby*, p. 1.)

645. In strict accordance with this principle, it has been recently held by the House of Lords, overturning several decisions of the Scotch Courts, that a master is not liable in damages to a servant for injury caused by the negligence of a fellow-servant, if the latter, when selected by the master, was a suitable person for the employment in which he was engaged. (*Bartonhill Coal Co. v. Mrs Reid*, June 17, 1858.)

646. The principle laid down by Lord Cranworth, and followed by the House, was, that when one workman enters into an engagement in which many other fellow-workmen are employed, he, in general, knows the risk he is exposing himself to; and he knows, moreover, that they are risks of a kind that are more within the immediate control of the servants themselves than of the master. There is a recent case on this subject (*Brownlie v. James M'Anlay*, 9th March 1860. In further illustration, see *M'Intyre*, Dec. 24, 1859, and *Gray*, Feb. 8, 1860), which was held by the Court not to be covered by the case last referred to,

and in which the master was accordingly held to be responsible. The circumstances were the following: A labourer in the employment of a builder was ordered by the foreman to carry stones on to a scaffolding, after the foreman had been told of, and admitted, its insecurity. The labourer, though he thought the scaffold insecure, obeyed his orders, fell from the scaffolding, and was severely injured. There was no proof either of the foreman's character or skill, or of his want of it, beyond the fact of the accident; or of the master's knowledge of the insecurity of the scaffolding. From this case it follows that a foreman is not a fellow-servant, and that his employment does not free the master from responsibility, unless he can prove him to be a person of character and skill.

647. *Liability of Master for Injury by a Servant to a Third Party.*—The opposite result will follow where the person injured is a stranger. In this case all that is necessary to render the master responsible is, that it shall be proved that the servant was guilty of negligence, and that he was engaged at the time in the ordinary business of his master.

648. If the employment in which the servant was engaged be of the nature he was hired to, the master's liability, where such exists, will not be taken away by the fact of his having given no express orders for the special act out of which the injury arose, or his not having been aware of its performance. (*Dougal v. Macartney*, 18th Dec. 1829; *Brown v. M'Gregor*, 26th Feb. 1813; *Baird v. Hamilton*, 4th July 1826; *Attorney-General v. Siddon*, 1 Crompt. and Jer. 220; *R. v. Dixon*, 3 M. and S. 11.)

649. But if the act was one which the servant was specially ordered not to do, even though lying within the line of his ordinary duties, the master will not be liable for the consequences. (*Linwood v. Hathorn*, 14th May 1817, H. of L., 19th March 1821, 1 Sh. Ap. 20; *Waldie v. D. of Roxburgh*, 1st March

1822, H. of L., 10th Feb. 1825, 1 W. and S. 1; *Howie v. Lovell*, 23d June 1826; *M'Laren v. Rae*, 10th Dec. 1827; *Miller v. Harvie*, 24th Dec. 1827.)

650. The same principles apply whether the injury arose from negligence or unskilfulness.

651. But where the damage arose from a wrong wilfully committed by the servant, the master will not be responsible, for no man can be responsible for another man's wrong-doing. On this principle the master will not be liable for trespasses committed by his servants, nor for injuries caused by their passion or intemperance. (*Fraser*, ii. 459; *Bell's Prin.* 2031; *Young v. Colts' Trustees*, 21st June 1832.)

652. A superior will not be responsible for the tortuous acts of an inferior acting in his absence, and whom he has not appointed. Thus, the captain of a man-of-war, or even of a merchant ship, will not be liable for injury caused by an officer commanding during his necessary or warrantable absence. (*Mitchell v. Stuart*, 1st Feb. 1838; *Nicholson v. Mouncey*, 15 East. 384.)

653. Where a crime is committed with the master's knowledge, or by his command, *both* master and servant are responsible, both civilly and criminally; the principle of the servant's responsibility being, that no man is bound to commit a crime, though commanded by another. (*M'Laren v. Rae*, 10th Dec. 1827; *Miller v. Harvie*, 24th Dec. 1827. See *Manley Smith*, p. 147, *et seq.*)

654. *Liability of Master for Contract by Servant.*—The master is not bound by a contract entered into by the servant unless it fall strictly within the limits of his commission. When the servant contracts in his master's name, either in a matter falling wholly beyond his commission, or when exceeding in degree the powers which he has received, he binds not his master, but himself, either wholly, or to the extent of the excess. (*Fraser*, ii. 450; *Manley Smith*, 154, *et seq.*, where the latest English cases will be found.)

655. *Obligation to pay Wages or Hire.*—In all cases of service this obligation is presumed on the master's part, and, consequently, an express or implied understanding must be proved before it will be held that the service was gratuitous or for less than the wages which are usual in the trade or occupation. But if the parties have gone on for some time at a certain rate differing from that of the trade, they will be held to have established an exceptional usage, which, in their case, will overcome the usage of the trade. (Fraser, ii. 426.) Where neither usage of trade nor usage of parties can be proved, the Court will give to the servant what, in the exercise of a sound discretion, they consider to be the value of his services, or they will leave the matter to a jury. (See *Implied Contract*.)

656. Where wages have been fixed by express agreement, no services, however zealous, will entitle the servant to claim an increase over the sum specified, unless they have been of such a nature as to take him out of the contract, or unless he can establish a new contract, express or implied. (*M'Whirter v. Guthrie*, Hume 760.)

657. *Interest on Arrears.*—The servant is entitled to interest on the arrears of his wages so long as they remain unpaid. (*Mansfield v. Scott*, 9th June 1831, and H. of L., 18th Feb. 1833.) But it is said that, if the wages be not fixed, interest will run only from the date of the decree by which the amount is determined. (Fraser, i. 428; *Wallace v. Geddes*, 13th June 1821, W. and S.)

658. *Deductions for Damage by the Servant.*—No deductions can be made from the wages of the servant for damage which he may have occasioned, unless it arose from conduct which was culpable, either in the sense of being malicious or negligent and careless. Any accidental destruction of furniture, crockery, or the like, not attributable to culpable negligence, cannot therefore be founded on as a claim against the servant, unless it can be

proved that there was a positive stipulation that the servant should pay for such losses out of his wages. (*Le Loir v. Bristow*, 4 Camp. 134.) In the case of waiters at inns and taverns, it is not uncommon to provide against such contingencies by insisting that the servant shall lodge a deposit from which all damage may be liquidated.

659. If the period of service has been accomplished without any challenge being made, the master's plea of misconduct in bar of a claim for wages will not be listened to. (*Tait v. M'Intosh*, 26th Feb. 1841.)

660. *Payments and Presents to Servants during the Engagement.*—Money given by the master to the servant during the period of service will not be allowed to be deducted from the wages, unless such appear to have been the understanding of the parties. Such sums will be regarded as presents, and more especially so if the servant be a minor, or if the object was the purchase of what were not strictly necessities. Thus, a master having advanced money to his servant girl to purchase a silk dress, it was held that he could not deduct it from her wages; and the same was the case with money paid for coach fares for the servant's mother. (*Hedgeley v. Holt*, 4 Card., p. 104.) So, also, jewels given to a servant will be regarded as presents, whereas ordinary clothes may be stated as payment *pro tanto* of wages, more especially in those cases of implied contract where no wages have been expressly stipulated or agreed to. (*Fraser*, ii. 429.)

661. *Hiring by an Overseer or other Agent.*—The question of wages will not be affected by the fact that the hiring was not by the master personally. If the agent was capable of contracting for the principal, he was capable of binding him for the amount of wages that he agreed upon. (*Narbonnie v. Scott*, Hume, p. 353. See *Wife*.)

662. *When Wages must be Paid.*—In the case of domestic servants the custom is for wages to be paid half-yearly, whatever

may be the period of service agreed on; and, in the absence of positive stipulation, they will be due accordingly. With regard to other servants equally, the matter will be regulated by custom, though in their case it is less consistent. (Ridgway, 4 N. and M. 797; *Mansfield v. Scott*, 18th Feb. 1833, W. and S.)

663. *Clothes and Livery*.—It forms no part of the master's obligation to find clothes or livery for the servant; and though he agree to do so, the clothes will not be held as part of the wages, but will remain the property of the master. (*Shiels v. Dalziel*, 2d July 1825.)

664. *Servant's Lien for his Wages*.—A tradesman may retain materials which have been put into his hand for the purpose of executing a piece of work, till payment be made to him of the expense which he has disbursed on it, and of the value of the workmanship which he has expended. But if the workman yield up possession of the subject, by delivering it to the party who employed him, his right of retention is at an end, even though he should afterwards recover the possession. If the material remains in the premises of the master there is no lien, because the workman never obtained possession. (Ersk. iii. 4. 21; Bell's Prin. 1415, 1420; Fraser, ii. 431–2.)

665. *Arrestment of Wages*.—Servant's wages, in so far as they are alimentary,—that is to say, in so far as they are necessary for a suitable aliment during the current term,—are not arrestable; but arrears and excess over a suitable aliment may be arrested. (Ersk. iii. 6. 7; Stair, iii. 1. 37.) This rule applies to remuneration for all sorts of service. It has been found to apply to a professor's salary (*Laidlaw v. Wylde*, M. App.; *vide Arrestment*, p. 4), to that of the rector of an academy (*Murray v. Bell*, 16th May 1833), of a pursuivant-at-arms (*Moinet v. Hamilton*, 2d Feb. 1833), and no doubt would apply to that of a judge of the Court of Session (see, however, Ersk., p. 732, Ivory's edition), or a member of the Administration. The amount neces-



sary for a suitable aliment will be determined entirely by the peculiar circumstances of each individual case.

666. *Prescription of Wages.*—Servant's wages fall under the triennial prescription; or, in the words of the statute, "unless he pursue within three years, the creditor shall have no action, unless he either prove by writ or by oath of the party," i.e., the defender. (Stat. 1579, c. 83.)

667. This Act applies to servants of all kinds—to superior as well as to inferior servants. (Robertson v. Marquis of Annandale, 1 Cr. and Stew. 293; M'Dongall v. Campbell, 22d June 1830, H. of L., 27th August 1833.) If no period has been fixed for payment of the wages, the prescription runs from the termination of the services rendered, when the wages are held to have been due.

668. Unless there be a positive stipulation to the contrary, the wages of every year or term run a separate prescription; and this, although the hiring should have been by written agreement, and for a series of years. (Ersk. iii. 7. 17; Fraser, ii. 434.)

669. The prescription is pleadable after the master's death by his heir. (Ritchie v. Little, 15th Jan. 1836.)

670. *Death of Master or Servant.*—If the servant die before the term, wages are due to his executors for the period he has served. If the master die before the term, full wages up to the term are due; and if the time for giving warning have expired, wages, and, in some cases, board, are due to the servant for another term. The master's executor may, however, claim the services of the servant. (Bell's Prin., secs. 180, 187; Ersk. iii. 3. 16.)

671. *Competition between Servants and Creditors.*—The right of the servant to wages is one of the privileged debts recognised by the law of Scotland; and as such entitled to a preference in competition with ordinary debts. This privilege was confined to farm and domestic servants; and the rule was construed so

strictly as to exclude, on the one hand, carpenters and smiths; though doing work on a farm during the year at a slump sum (Fraser, ii. 437); and, on the other, clerks, oversmen, mashmen in a distillery, artisans employed in the establishment, and the like. But by the Bankrupt Act (19 and 20 Vict., c. 76, sec. 122) it is provided, that "the wages of workmen, and of clerks, and shopmen, and servants employed by the bankrupt, where such wages do not exceed sixty pounds per annum, shall be entitled to the same privilege as the wages of domestic servants, to the extent of a month's wages prior to the date of sequestration being awarded, or where sequestration is not awarded, prior to the concurrence of diligence for distribution of the estate of a party being notour bankrupt."

672. *Giving a Character.*—However long and faithfully the servant may have served, the master is not bound, at the close of his service, to testify to his honesty, sobriety, or skill. (Fell v. Lord Ashburton, 12th Dec. 1809, F. C.) The duty of giving a character being one which, however binding in morality, it has not been found convenient to enforce by positive law.

673. But, if given, the character must be strictly true; in which case the master will be held perfectly justifiable, even though it be prejudicial. (Bell's Prin. 189; Fraser, ii. 440.) Such a character, however, must in general be asked for, as the master is not entitled needlessly and ultroneously to publish his servant's infamy (Christian v. Kennedy, 6th July 1818); and, in that case, it will be for the servant to prove its falsehood, not the master to prove its truth. But there are cases in which the master would be fully justified in stating, unsolicited, facts to the prejudice of his servant, though, in doing so, he might undertake the obligation of proving them. "I do not mean to intimate," said Lord Alvanley, "that if a servant were strongly suspected of having committed a felony while in the master's service, that master is not at liberty to warn others from taking him into

their service.” (Rogers *v.* Clifton, 3 B. and P., p. 592.) Where an action of damages is raised by the servant in such a case, it will be a question for the jury whether the defendant acted *bona fide*, with the intention of communicating facts which the other party ought to know, and honestly intending to discharge a duty, or whether he has acted maliciously, and simply for the purpose of injuring the servant. (Pattison *v.* Jones, 8 B. and C. 584.)

674. If the character, whether solicited or unsolicited, be false, the master will be liable in damages to the servant; the falsehood being held to imply malice. (Anderson *v.* Wishart, 13th July 1818.) Even if true, the character, if prejudicial, must not be more so than the circumstances render necessary. (Fountain *v.* Brodie, 2 Gale and Davidson 455.) Acts of petty dishonesty, such as are too common amongst servants, will not entitle the master to brand the servant as a thief. The safe course, in such circumstances, is to state the offence, and not to apply to it a *nomen juris* which may possibly convey an erroneous impression as to its magnitude. (Fraser, ii. 442.)

675. *Damages for giving False Character in the Servant's Favour.*—There is reason to fear that, partly from thoughtless good nature, and partly from a selfish desire to get rid of a bad servant without the annoyance of a dispute, false characters are given in favour of servants very much more frequently than to their prejudice. It is desirable that masters and mistresses should keep in mind that they may render themselves liable in reparation of any damage which can be shown to be the direct result of thus perpetrating on a stranger a wrong which is manifestly within the reach of the common law. (Partey *v.* Freeman, 3 T. R. 51; Foster *v.* Charles, 6 Bing. 396; Fraser, ii. 442; Manley Smith, 275.)

676. *Is the Master entitled to Assign the Servant to Another?*—Where the nature of the service is such as to render a choice of

person (*delectus personæ*) of the essence of the contract, the master cannot assign the servant to another, nor give to a new master a right to his services along with himself. He cannot, by assuming a partner, give him the rights of a master over a domestic servant, a governess, or even a clerk. It is part of the agreement that the servant shall do the work of the master who hires him, and of him alone. (*Harkins v. Smith*, 11th March 1841, F. C.)

677. The case of artisans is different. The assumption of a partner in trade is so ordinary an occurrence, that it is regarded as a contingency contemplated by the contracts into which tradesmen enter, and consequently will not free their servants. But if the original master quits the firm, it would seem that the servants are not bound to remain. (*Fraser*, ii. 444 and 474.)

678. Where the original engagement was with a company or corporation, there never was an individual master at all; and, therefore, whilst the place, the time, and the nature of the employment remain unaltered, the servant will not be freed from his contract by an entire change of the partners. But even companies cannot assign their servants to other companies or individuals. (*Edinburgh Glass Co. v. Shaw*, M. 597.) There is a distinction also between a case in which the contract is terminated by a voluntary act of the master, and one in which its termination arises from circumstances over which he had no control. Servants who would not be bound to transfer their services in the former case will often be bound to do so in the latter. (*Fraser*, ii. 472.) Where, for example, a master dies, his domestics will be bound to continue till the termination of their engagements in the service of whoever may become the head of his family, and to yield him the same obedience and respect as if he had been their original master.

679. *Termination of the Contract by Master's Death or Bankruptcy.*—In these, as in all other cases where the contract has

been dissolved from circumstances which were beyond the master's control, the damages to the servant will be restricted to the smallest possible amount. Wages will be given till the next term only, though the contract may have been for years; and the servant is bound at once to look out for other employment, should the executor not require his services, on procuring which his claim for wages from his former master will cease. In claiming the full fee for the current term, it will be incumbent on him to show that he used due diligence to obtain another engagement, and that he was unsuccessful. (Bell's Prin., secs. 187, 188; 2 Hutch. 166; Puncheon v. Haig, M. 13990; Fraser, ii. 449 and 472.)

680. *The Servant is not bound to return when improperly dismissed from the Service.*—It will not be a competent defence to the master against a claim for damages by the servant, to offer to receive him again into his employment if he has been improperly dismissed. The contract, once broken, cannot again become a binding engagement without the consent of both parties. (Fraser, 449.)

681. *Damages for enticing Servant to leave.*—A master is entitled to damages from a third party, who, in knowledge of a subsisting engagement, entices a servant away from his service. The rule is of importance in manufacturing districts, where the possession of many hands at particular moments is often an object of so much urgency as to occasion rivalry amongst employers. (Fraser 466, and cases cited.)

#### VII.—*Termination of the Contract.*

682. *Warning.*—When no warning has been given by either party, a renewal of the contract by tacit consent will be presumed, unless the presumption be excluded by a well established local practice. The terms of the original agreement are those which regulate the renewed contract, except the time. (Tait v. M'In-

tosh, 26th Feb. 1841 ; Fraser, 468.) And the time will be determined by the length of the previous engagement, and the presumption in law applicable to the particular kind of service. (Ibid.) Where the original engagement was in writing, and for more than a year, the renewal will be only for one year, as a tacit cannot exceed a verbal contract. (Fraser, ii. 385 and 468.)

683. There is no formal style of warning. In practice it is almost always verbal, and it is not necessary that it should even be in express words. If a gentleman tell his coachman that he is not to keep a carriage after Whitsunday, that is sufficient notice to the coachman that his services will not be required after that time. (Ib. 469.) On the other hand, the servant, by entering into a contract, the performance of which is incompatible with the further discharge of his duty to his master, is held by intimating the new engagement to the master, to give sufficient notice of his intention to quit. Enlistment on the part of a male, or marriage on that of a female servant, may be mentioned as examples. (M'Donnell v. Dixon, M. App. Mut. Cont. 3.)

684. It has been said that warning must be given forty days before the termination of the contract (Fraser, ii. 470); but, though in some districts this may be required by custom in the case of servants engaged for lengthened periods, it certainly would not be requisite anywhere, if the engagement was from month to month. In such a case, a month's warning, in accordance with the English practice (Manley Smith, p. 52), would be a sufficient answer to any claim for damages on either side, or even fourteen days where such was the practice. (Burton, Private Law, 254.)

685. *Time to look out for new Place.*—A servant, after having given or received warning, is entitled to a little liberty to look out for another situation. Without this, the object of the warning would be defeated; and there can be no doubt that, by refusing it altogether, the master would render himself liable in

damages to the servant. On the other hand, the servant must make those needful inquiries at the time and in the manner that will least incommode his master or his family. If the master has fixed an hour when it is possible for him to accomplish his object, he must take that hour and none else. (Fraser, ii. 445; *R. v. Potter Hergham*, Burr S. C. 690.)

686. *Old and New Style*.—Where there is neither covenant nor uniform and notorious usage to the contrary, the commencement and termination of the contract will be regulated by the new style. (Fraser, ii. 472.)

687. *Servant's Obligations to Depart and Deliver up Property*.—Where the servant has been dismissed, the master may expel him from his house or premises, and treat him like any other trespasser if he refuse to depart. Even though the dismissal be illegal, and though the servant should ultimately be found entitled to damages, he will not be justified in remaining in his situation in opposition to the commands of the master. (*Ante*, secs. 631, 632; Burn, Justice, p. 851; Fraser, ii. 472.) The case might be different if the dismissal, particularly of a female servant, were to take place during the night, in a foreign country, or in circumstances which rendered departure dangerous or impracticable.

688. The servant is bound to quit any separate premises which he may have occupied as servant, without receiving the notice to which he would have been entitled as tenant, and he must also deliver up all the property of his master of every kind which may be in his possession. It has been doubted whether this rule would apply to ground which he has put under crop, or a garden which he has stocked with vegetables. But the case of *Scougal v. Crawford*, (2 Mur. 110, quoted by Mr Fraser, ii., p. 474), does not seem to bear out the doubt, and it is not supported by the law of England (*Bertie v. Beaumont*, 16 East. 34, and other cases given by Manley Smith, p. 45.)

VIII.—*Statute Law relative to the Contract of Service.*

689. It has been chiefly in the departments of manufacturing and agricultural labour that the provisions of the common law have been found insufficient to regulate the relations of master and servant; and the enactments which have been framed with a view to supplying this defect, have had reference to the circumstances of England more especially. The prior statutes on the subject have been practically superseded by the 4 Geo. IV., c. 34, of which the chief object is to give to masters a remedy against the absconding of their workmen.

690. The statute applies expressly to servants in husbandry, artificers, calico-printers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, labourers, and other persons entering into written contracts of service. In case of any such person either declining to enter into or commence the service, where the contract is in writing, or where he has entered upon the service whether the contract be in writing or not, or absenting himself before the termination of the contract, or otherwise neglecting to fulfil it, it shall be lawful for any justice of the peace, upon complaint made to him upon oath by the employer, or his steward, manager, or agent, to issue a warrant for the apprehension of the servant complained of, to inquire into the nature of the complaint, and, on being satisfied that it is well-founded, either (1) to commit him to the house of correction, there to be held to hard labour for a period not exceeding three months, and to abate a part of the wages corresponding to such period of confinement; or (2) to punish the offender by abating the whole or any part of his wages. Should the justice arrive at an opposite conclusion, he may discharge the servant from his contract of service without fine or punishment, which discharge shall be given under the hand and seal of the justice *gratis*.

691. By the subsequent statute, 10 Geo. IV., c. 52, the pro-



visions of this Act are extended to persons employed in several additional branches of manufacture. The general "misconduct or misdemeanour" which will bring the servant within the operation of the statutes, must be "in the execution of the contract or otherwise respecting the same;" for the servant is not liable to be punished under them for every act of misconduct. In addition to masters and servants, the statutes apply to apprentices; and complaints against them for disobedience and idling away their time, have been found competent under the clause which applies to general misconduct. (Fraser, ii., p. 617.)

692. The workman must give a fair day's work; and as the Court has held review on the merits to be incompetent, the question as to what is a fair day's work must be determined by the justice. A collier, who had been in the habit of putting out thirteen loads of coals daily, refused to put out more than eight loads. This the justices held to be misconduct under the statute, and the Supreme Court declined to interfere. (*Blackwood v. Finnie*, 1st June 1844, 2 Broun 206.)

693. This statute has been found in practice to be a source of much litigation. To meet the sudden exigencies of desertion, the form of application is hastily drawn up, and it frequently happens that a blunder has been committed either in its preparation or in the subsequent proceedings. The result is a bill of suspension and liberation to the Court of Justiciary, and probably an action of damages against the master.

694. It has been positively decided that none of the statutes on this subject refer to menial or domestic servants. (*Normant v. Wilson*, 25th Jan. 1845, 2 Broun, 375.)

695. In order to entitle the master to raise an action against the servant, under the statutes, for not entering to his service, the contract must be in writing. If the servant has already entered, it is indifferent whether it be written or verbal. (Fraser, ii. 481.)

696. *Complaints by Servant against the Master.*—There is an earlier statute (20 Geo. II., c. 19) authorizing justices to determine disputes about wages, and to entertain complaints by servants against masters, which, if it extends to Scotland (Mr Fraser, vol. ii., p. 494, and elsewhere, holds this statute to extend to Scotland; but sec. 6 renders the point at least doubtful), may be regarded as to some extent the converse of the leading statute to which we have just referred. Unless the money decerned for under this statute be paid within twenty-one days, the justice is empowered to issue a warrant to levy the same against the master by distress. An appeal is allowed to the Quarter Sessions, whose decision is final.

697. *Wages must be paid in current Coin.*—There are two statutes—1 and 2 Will. IV., c. 36, and 1 and 2 Will. IV., c. 37—the object of which is to prevent the very objectionable practice by masters of keeping stores, and paying their workmen by allowing them to run up accounts for provisions, with which they supplied them, of an inferior quality, and at an extravagant price.

698. By the second of these statutes it is provided that all contracts of hiring with artificers must be in the current coin of the realm, and that there must be no stipulations as to the manner in which the wages shall be expended. All wages are to be paid in coin; it being declared that the servant may recover “the whole, or so much of the wages as shall not have been actually paid to him by his employer, in the current coin of the realm.” It is further provided, that no employer shall have an action against his artificer for goods supplied to him on account of wages. Penalties not exceeding ten nor less than five pounds for the first offence, are imposed; and though it is provided that one partner shall not be liable in person for the offence of his copartner, the partnership property is to be so liable.

699. The statute applies exclusively to artificers, a list being furnished of the classes of manufacturing labourers falling under its provisions; and it is expressly provided, that “nothing herein contained shall extend to any domestic servant or servant in husbandry.”

700. As exceptions to the general enactment, the employer is allowed to supply medicine or medical attendance, fuel, materials, tools or implements, and food to be consumed by horses employed in the trade. He may let a tenement to the artificer, or supply him with victuals dressed and consumed under his own roof. Another exception is to the effect that the employer may advance money, to be contributed by the artificer to a savings’ bank or friendly society, for his relief in sickness or for the education of his children.

701. *Arbitration between Master and Workmen.*—The disputes for the determination of which by arbitration provision has been made by the Legislature, are the following: 1st, As to the price of work, whether arising as to payment of wages, hours of work, injury done to the work, delay in finishing it, or bad materials; 2d, As to expense which may have been occasioned to the workmen by the purchase of new implements, required for the execution of a new pattern; 3d, As to the dimensions and quality of goods; 4th, As to remuneration for pieces of extraordinary length; 5th, As to various matters connected with the cotton manufacture; 6th, All disputes generally arising out of the particular trade or manufacture, and which cannot be otherwise determined; and 7th, Disputes between masters and persons engaged in sizing or ornamenting goods.

702. All these disputes may be referred to any justice of the peace, or other magistrate, by a writing under the hands of the master and workmen, for his summary and final determination; and if the parties do not agree to such reference, either of them is entitled to complain of the other’s refusal; in which case the

magistrate may summon the party refusing to appear before him. Should he fail to appear, or to remove the cause of complaint, the justice may then be called upon to propose a list of referees, consisting of from four to six in number,—one half being masters, agents, or foremen, and the other half workmen; the master choosing one of the former, and the workmen one of the latter half. (5 Geo. IV., c. 96, sec. 3.) If the arbiters cannot decide in three days, the matter reverts to the magistrate, whose decision is final.

703. The Acts further provide for the enforcement of any other method of arbitration which the parties may agree to adopt.

704. The leading enactment on this subject is 5 Geo. IV., c. 96 (21st June 1824); which is supplemented by 7 Will. IV. and 1 Vict., c. 67, and 8 and 9 Vict., c. 128; the latter having reference to silk weavers exclusively.

*Restrictions on the employment of Women and Children in  
Factories, etc.*

705. The low rates at which the labour of women and children may be obtained, having led to their employment in various branches of manufacture to an extent and under arrangements which were hurtful both to health and morality, various attempts have been made to mitigate the evil by legislation. The most important of these enactments is 7 and 8 Vict., c. 15, "To amend the laws relating to labour in factories," and 8 and 9 Vict., c. 29, "To regulate the labour of children, young persons, and women in print-works." The Acts 3 and 4 Vict., c. 85, "For the regulation of chimney-sweepers," and 5 and 6 Vict., "To prohibit the employment of women and girls in mines and collieries, to regulate the employment of boys, and to make other provisions for persons working therein," have been dictated by the same benevolent motives.

*Combinations among Workmen.*

706. Combinations to force masters to agree to workmen's demands, or to intimidate other workmen, are declared to be illegal by the 6 Geo. IV., cap. 129 ; and justices and sheriffs are empowered to punish those who belong to them with imprisonment for any time not exceeding three months, with or without hard labour. The statute does not prohibit meetings either of masters or workmen for the purpose of consulting on their respective interests, and determining the rates of wages or hours of work. Its provisions strike only against cases in which either breach of contract or violence is contemplated by the individuals associated or intended to be forced on their fellow-workmen.

*Seamen.*

707. In the Merchant Shipping Act (17 and 18 Vict., c. 104), the Merchant Shipping Amendment Act (18 and 19 Vict., c. 91), the Passengers Act (18 and 19 Vict., c. 119), and others of minor importance, we now possess a code of mercantile legislation tolerably complete, and far too minute and complicated to be presented in a work like the present. The relations between seamen and their employers and masters, which alone belong to this branch of law, are regulated by Part III. of "the Merchant Shipping Act, 1854" (17 and 18 Vict., c. 404, secs. 109 to 290).

708. In all ships, except those of small tonnage engaged in the coasting trade, the master is bound to enter into a written agreement with every seaman whom he carries to sea. The seaman undertakes to serve on board the ship during the voyage, the duration and character of which must be specified in the agreement, for certain specified wages and provisions, to conduct himself in an orderly, faithful, and honest manner, to be diligent and obedient to the master, or to any person who shall succeed

him in command, and to the officers of the ship. "The breach of these duties, and of this engagement," says Mr Abbot (*Law of Merchant Ships and Seamen*, p. 135), "consists in desertion, quarrelsomeness, turbulence, mutiny, disobedience, neglect of duty, drunkenness,—offences which, according to the frequency of their occurrence, the length of their continuance, and their circumstances in each particular case, besides the penalties and forfeitures enacted by the statutes, may at common law justify the personal restraint and correction of the mariner, or subject him to dismissal and forfeiture of wages."

709. However manfully and efficiently the mariner may have performed his duty, and however great may have been the perils or actual sufferings to which he has been exposed, he is not entitled to any remuneration beyond his covenanted wages. For these the ship is pledged to him. "He has a right to cling to the last plank in satisfaction of his wages." The old maxim, that "Freight is the mother of wages," has been abrogated by the Merchant Shipping Act (17 and 18 Vict., c. 104), and wages may now be recovered, either by seamen or apprentices, even though no freight has been earned by the vessel. But in cases of shipwreck the mariner's claim for wages will be barred by proof that he did not exert himself to the utmost to save the ship, cargo, or stores: sec. 183. (See Digby Seymour's *Merchant Shipping Acts*, p. 123, *et seq.*)

710. The following are the regulations of the statute as to the *time of payment*:—

711. "In the case of a home-trade ship, the wages shall be paid within two days after the termination of the agreement, or at the time when the seamen shall be discharged, whichever shall first happen; and in the case of all other ships, except ships employed in the southern whale fishery, or on voyages for which the seamen, by the terms of their agreement, are compensated by shares in the profit of the adventure, the wages shall be paid,

at the latest, within three days after the cargo shall have been delivered, or within five days after the seaman's discharge, whichever shall first happen; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid on account a sum equal to one-fourth part of the estimated balance due to him; and if any master or owner shall neglect or refuse to make payment in the manner required, without sufficient cause, he shall, for every such neglect or refusal, pay to the seaman the amount of two days' pay for each day, not exceeding ten days, during which payment shall, without sufficient cause, be delayed beyond the respective periods aforesaid; and such sum shall be recoverable as wages." (Sec. 187.)

712. When a seaman is left on shore at any place abroad, in consequence of being unable to proceed on the voyage, the master is to deliver to certain functionaries, named in the Act, a just and true account of the wages due, and to pay the same to the seaman, either in money or by a bill drawn upon the owner of the ship. (Sec. 209.)

713. In order to prevent desertion, and to preserve the wages of seamen for the benefit of their families, the Legislature has restricted the sum which may be paid to them, in parts beyond the seas, to one-half.

714. By deserting the ship, the seaman forfeits not only his wages, but also all clothes and effects he may have left on board; and if the master has been forced to pay higher wages in order to procure a suitable substitute, the difference will form a ground of claim against the seaman. (Sec. 243 (1).) If the seaman, having left the ship with leave from the master, refuses to return, his wages are forfeited. (Sec. 243 (2).)

715. Arrival of the ship in port does not terminate the agreement; and by departure without leave from the master, or other just cause, before she is placed in security, the mariner subjects himself to forfeiture of a month's wages. (Sec. 243 (3).)

716. The seaman is entitled to his food, and want of provisions will justify him in leaving the ship. (1 Hagg. 59 and 182; Shee's Abbot, 136.)

717. Cruelty on the part of the master, or an entire change in the destination of the vessel, will also justify departure. (Limland v. Stephens, 3 Esp. 269; Edward v. Trevellick, W. R., vol. ii. 586; Shee's Abbot, ut sup.)

718. It is not desertion if a seaman leave his ship for the purpose of forthwith entering the royal navy; and stipulations for the purpose of defeating the proviso of the Act to this effect are not only void, but they subject the master or owner who has caused them to be inserted in the agreement to a penalty of L.20. (Sec. 214.)

719. It has been decided by the Court of Admiralty, that if a woman does the work, she is entitled to claim the wages of a mariner. (Jane and Matilda Chandler, 1 Hogg, Ad. Rep. 187.)

## CHAPTER V.

### MASTER AND APPRENTICE.

720. The term apprentice is derived from the French word *apprendre*, to learn; and the contract of apprenticeship, accordingly, is one whereby one person becomes bound to teach, and another to learn, a certain trade or profession.

721. The obligation, on either side, may be either gratuitous or for a pecuniary consideration.

#### I.—*Origin and Nature of the Contract.*

722. Apprenticeship originated in those guilds and corporations into which craftsmen entered, during the middle ages, for



purposes, partly of monopoly, and partly of mutual protection against feudal oppression. In all stages of society, more particularly in its earlier and simpler stages, trades and professions are frequently hereditary; and even where such is not actually the case, the relation between master and apprentice bears so close an analogy to that of parent and child, that apprenticeship has always been reckoned amongst the domestic relations. Much interesting and curious information and speculation as to the origin of the "colleges," guilds, and corporations of modern Europe, and their relation to the previously existing organization of Roman provincial society, will be found in Sir Francis Palgrave's *Rise and Progress of the English Commonwealth*, i., p. 329, *et seq.*; see also his *History of England and Normandy*, i. 33.

723. Till recently, the members of the respective corporations of which the burghs of Scotland were composed, possessed exclusive privileges of trading within their bounds; and these privileges they communicated only to those who became members of their body by means of apprenticeship. These exclusive privileges are now abolished (9 Vict., c. 17); but the incorporations still retain their other corporate privileges; and their regulations for the admission of their members, unless contrary to law, are valid and binding. The same remark applies to such professional incorporations as the Writers to the Signet in Edinburgh, who still deny admission to their body unless an indenture be produced.

724. The rules by which it is intended that the relations of the master and apprentice shall be governed in each particular case, must be embodied in a written instrument, regularly signed and tested, which is termed an *indenture*, from the English practice of cutting it in two, or rather dividing the duplicates of which it consists, in a waving line; so that when the one half, which is retained by the master, is applied to the other half retained by the apprentice, the two indented edges shall

tally. Notwithstanding the origin of the name of this instrument, it has been decided in England that an indenture of apprenticeship need not be indented. (R. v. Stratton, Bur. Set. Ca. 72; see Arnold's Municipal Corporations, p. 59.) In Scotland it never is.

725. No technical words are necessary to constitute the relation of master and apprentice; though the decisions both here and in England seem to be to the effect, that *teaching* on the one hand and *learning* on the other must be expressly set forth as the primary objects of the contract, and will not be presumed, from the respective ages or other circumstances of the parties, or the nature of the employment. It is necessary that there should be some such mode of distinguishing between apprenticeship and service, because, if a person who is an apprentice be punished under the statutes as a servant, or *vice versa*, the whole proceedings will be illegal, and an action of damages will lie against the complainer. "The contract with an apprentice," said Lord Jeffrey, "though it may include a contract to work for hire, is primarily a contract to teach and to learn a certain handicraft." (Frame v. Campbell, 9th June 1836.)

726. *Who may enter into an Indenture.*—An apprentice is generally under age. If he be a pupil (*i. e.*, under fourteen), the indenture is signed by his father as his administrator-in-law, or his tutor, he being himself incapable of contracting. If he be a minor (*i. e.*, from fourteen to twenty-one), his father, or his curators, if he have them, must be parties to the indenture (Low v. Henry, Hume, p. 422); but they only consent to the obligations which the apprentice, in this case, takes expressly on himself. If he have neither father nor curators, he may enter into the contract without them, though his deed would be liable to be reduced, on the ground that advantage had been taken of his inexperience. (Manley Smith, Master and Servant, p. 7; Stair, i. 6. 32; Ersk. i. 7. 33.)

727. If the minor deceive the master, by representing either that he has no curators or that a wrong person is a curator, and that person sign the deed along with the minor, it will be binding on the minor. (Fraser, ii., pp. 237, 590, and authorities cited.)

728. In all these cases, the pupil or minor may be restored against the indenture, if he can prove that he has suffered lesion by it; for example, if it binds him to a trade obviously beneath his station, or imposes obligations of a harsh, griping, or immoral nature. (Harvie v. M'Intyre, 7th March 1829; Ersk. i. 7. 62.)

729. *Contract must be in Writing.*—Actual service or teaching on trial will complete a written contract of apprenticeship, although in many respects informal, but it will never supply the absence of writing. (Fraser, ii. 591; Arnold, p. 59)

730. *Stamp.*—The indenture must be stamped; the amount of duty increasing in proportion to the premium paid or the value of the interests involved. If the apprentice-fee is not accurately set forth, the indenture will be void.

731. By the Merchant Shipping Act (17 and 18 Vict., c. 104, sec. 143), all indentures of apprenticeship to the sea-service are exempted from stamp duty; and a similar exemption has all along existed in the case of pauper children apprenticed by the parish or by a public charity. In these cases it is unnecessary to state the premium.

732. Where there is no premium the duty is 2s. 6d.

733. Indentures may usually be stamped after the date of their execution, during periods which vary according to circumstances; but the safer course is to write them on stamped paper.

## II.—*Obligations of Master and Apprentice.*

734. Almost all corporations and societies have peculiar arrangements with reference to their apprentices, and to these, if they do not interfere with law, the Court will give effect.

735. The apprentice cannot be called upon to perform menial

or other duties unconnected with the trade of his master, unless they be stipulated in the indenture. (*Peter v. Torrol*, 2 Muir 28 (1818).)

736. A mason, who kept his apprentice constantly hewing stones, without teaching him to build, was found to have committed a breach of contract. But in large cities, where hewing and building are separate occupations, carried on by different individuals, this rule probably would not apply. (James Carswell, 7th July 1794; *Fraser*, ii. 604.)

737. The master generally cannot fulfil the duty of teaching his apprentice unless he attends to his own business; but if he have a skilful partner or other superintendent, his personal superintendence will not be required. (*Gardner v. Smith*, M. 593.)

738. The master is not entitled to transfer his apprentice to another, unless it be the custom of the trade to do so; but, in many trades, the custom is so well established and so notorious, that both parties would certainly be held to have had it in view at the time of contracting. (*Edinburgh Glass Co. v. Shaw*, M. 597; *Fraser*, ii. 603, note.)

739. *Enlisting*.—By the common law of Scotland, the apprentice cannot enlist (*M'Gregor v. Mitchell*, 31st May 1825; *Fraser*, ii. 597); but this is modified by the Mutiny Act, which is passed annually. The following is the provision:—"No master shall be entitled to claim an apprentice, who shall enlist as a soldier in Her Majesty's service, unless he shall, within one calendar month after such apprentice shall have left his service, go before some justice, and take the oath mentioned in the schedule to this Act annexed (to the effect that the apprentice is bound to him); and unless such apprentice shall have been bound, if in Scotland, for the full term at least of four years, by a regular contract or indenture of apprenticeship prior to the period of enlistment; and unless such contract shall, within three months after the commencement of the apprenticeship and before the enlistment

have been produced to a justice of the peace, and there shall have been endorsed thereon a certificate or declaration, signed by the justice, specifying the date, where, and the person by whom such contract or indenture shall have been produced." It is provided, however, that the master of a marine apprentice shall be entitled to recover him, "notwithstanding such apprenticeship may have been bound for a less term than four years." No apprentice can be redeemed if he exceeds the age of twenty-one. (Young v. Monkton, 1 March 1809.)

740. A person enlisting is always asked if he is an apprentice. If he declares that he is not, and the master afterwards claims him, he may be tried by the judge ordinary, and punished. He is liable to serve as a soldier when his apprenticeship is at an end; and if he fails to deliver himself up, he may be punished as a deserter.

741. If the master does not insist in his claim to recover the apprentice, he will receive, to his own use, so much of the bounty payable to the recruit as has not then been actually paid to him, minus two guineas for necessaries. (See the Annual Mutiny Act.)

742. The master is entitled to all the earnings of the apprentice, whether gained in the service of another or by employment on his own account. (Fraser, ii. 598 and 473.)

743. If the apprentice fail to conduct himself with decency, honesty, and sobriety, the master is entitled to dismiss him, and to claim damages from his cautioner. (Bunell v. Alexander, 12th June 1793; Fraser, ii. 600.)

744. On the subject of dismissal, the principles already stated under the contract of service are, for the most part, applicable to that of apprenticeship.

### III.—*Dissolution of the Contract.*

745. The consent of both parties, if clearly expressed in writing, will be sufficient to dissolve the contract; and at the death of either party it is at an end. (Fraser, ii. 611.)

746. The executors of the master will not be compelled to refund such part of the apprentice-fee as may be considered a fair remuneration for the instruction given during his life. (*Cutler v. Libberton*, M. 583 ; *Burn's Justice*, i. 200.)

747. Should the contract, on the other hand, be dissolved by the death of the apprentice, the whole fee remains with the master. (*Shepherd v. Innes*, M. 589.)

748. The insanity of either party will void the contract, unless it be a merely temporary attack. (*Lessels*, 3 Sup. 337.)

749. The master's bankruptcy will put an end to it, and entitle the apprentice to rank on the sequestrated estate for a suitable proportion of the apprentice-fee. (*Ogilvy v. Hume*, 2 Sup. 34.)

750. The marriage of a male apprentice does not annul the contract ; but on the marriage of a female her husband will be entitled to her person, though he will be liable in damages to the master. (*Fenton v. Findlay*, Elch., voce *Apprentice*, 3 ; *Fraser*, ii. 612.)

751. The contract will be dissolved by any occurrence which renders either party incapable of fulfilling its obligations, whether the occurrence be voluntary, as by failing to take out a license to practise required by statute, or involuntary, by becoming utterly and permanently disabled by bodily disease. (*Fraser*, ii. 613.)

752. An indenture to a company will be binding so long as one of the original partners is in existence ; and, in the case of a joint-stock company, it will not be at an end though all the original partners retire, provided no attempt be made to transfer the apprentice to a different company. (*Ib.* 613.)

753. *Cautioners of Apprentices.*—The cautioner binds himself that the apprentice shall faithfully discharge his duty, under the penalty of a certain sum to be paid to the master on failure. (See *Guarantee Association*.)

754. Cautioners have the benefit of division; but, even before the passing of the Mercantile Law Amendment Act (19 and 20 Vict., c. 60, sec. 8), the master was not bound to discuss the apprentice before coming on them. (*Balfour v. Hutton*, M. 3585; *Forbes v. Dickson*, 4 Sup. 708.)

755. Every plea which would be valid to the apprentice as a defence against an action of damages for breach of contract, will be valid to the cautioner. (*Aikman*, M. 12311; *Robertson v. Smith*, Hume, p. 20.) If the penalty in the indenture is greatly beyond remuneration for damages, it will be equitably restricted by the Court.

756. The cautioner has an action of relief against the apprentice in all cases in which he is called upon. (*Ersk.* iii. 3. 65.)

757. *Statutory Provisions.*—The statute 4 Geo. IV., c. 34, and the other statutes having for their object the settlement of disputes between employers and employed, and the protection of women and children from unhealthy or immoral occupations, are also applicable to apprentices. (*Ante*, p. 112, *et seq.*)

## CHAPTER VI.

### HERITABLE AND MOVEABLE SUCCESSION.

#### *I.—Of the Distinction between Heritable and Moveable Property.*

758. It is indispensable, for many legal purposes, that the line by which heritable and moveable property in Scotland are distinguished should be distinctly traced. Some of these purposes have already been pointed out in treating of the relations of husband and wife, and parent and child; but it is in its influence on the laws by which the succession to property and its transmission are regulated, that the importance of the distinction which we have mentioned becomes most apparent.

759. The character of heritable or moveable, which in some though by no means in all respects corresponds to real and personal property in England, may belong to an object, either,—1, from its own nature,—i.e., from its being really immoveable, as lands or houses; or moveable, as money or furniture; or, 2, from its relation to a subject which possesses either of these characteristics; or, 3, from the destination of its owner, he having placed it in the position of an accessory to some other object, or declared that in respect to succession it shall be regarded as possessing one or other of these characters.

760. (1.) *Natural Character*.—Land, and all parts of land, such as mines and quarries, and generally things which are naturally immoveable, are in law heritable. Whatever moves, or is capable of being moved from place to place, without injury or change of nature, either in itself or in a subject with which it is connected, is moveable. (2 Stair, i., sec. 2; 2 Ersk. ii., secs. 4, 7; Bell's Prin., sec. 1472.)

761. (2.) *Accessory Character*.—Things which are naturally moveable may become heritable, from the relation in which they stand to immoveable objects; for example:—

762. Anything which has been artificially attached to land, so that it cannot be removed without destruction, or change of nature or of use, is heritable by accession. Though this accessory heritable character may be acquired by objects which are neither built on the soil nor fixed into it, it is generally to buildings and fixtures in mills, houses, and to objects which are so fixed, or of such extent that they cannot be removed entire, that it belongs. (2 Stair, ii., sec. 4; 2 Ersk. ii., sec. and 5, note to Ivory's edn., p. 241; Bell's Prin., sec. 1473.) Trees, evergreens, and all plants not requiring seed or cultivation, are likewise heritable (Macleod, June 24, 1761, M. 5436; Anderson, 6 D. 1315), the reverse being the case with the industrial



fruits of the soil. These latter go with the property of the seed and labour, and are regarded as manufactures, in which the productive powers of the soil are employed. (Stair, Ersk., and Bell's Prin., *ut supra*.) Things, on the other hand, which are heritable in their nature, may become moveable by possessing the character of accessories to moveable objects of greater importance. A share of heritable subjects, forming part of the stock-in-trade of a mercantile company, is a trust estate in the partners, and moveable. (Bell's Prin. 1974.)

763. *Heirship Moveables*.—Such portions of the furniture of a mansion-house and stocking of a farm as will enable the heir to keep up the establishment, though moveable in their nature, become heritable by accession. In moveable subjects that are counted by pairs, or dozens, such as plate, linen, and the like, the best pair or dozen, and in cattle the best yoke, go to the heir on this principle; and the same is the case with the family seal, and all articles of plate and furniture which possess the character of “heir-looms.” (Stair, iii. 5. 9; Ersk. iii. 8. 17; 1474, c. 53.)

764. *Destination*.—Where there has manifestly been a purpose with reference to any object which, if effected, would have changed its character from moveable to heritable, or the reverse, it will be changed accordingly. Thus, materials prepared for completing the windows of a house, though not yet applied to that purpose, have been held to be heritable. (Johnson, Feb. 25, 1783, M. 5443.) The same will be the effect of a positive destination in point of succession either to the heir or the executor. Books and furniture may thus be made heritable by destination as regards succession. (Veitch, May 25, 1808, M. Sewand, Conf. App. 4.) But the character thus artificially imposed on subjects by destination, will not be permitted to change their character as regards the diligence of creditors. (Forbes, 1772; Bell's Prin. 1475.)

765. *Incorporeal Subjects*.—These follow the analogy and share the character of the corporeal subjects to which they refer. Thus, rights to land, whether of property or liferent, and debts secured on land, are heritable.

766. Simple personal debts, even though payable at a future time, with interest from that time, are, in general, moveable (Ersk. ii. 2. 7; Tuffie, Jan. 14, 1808; Hay, May 15, 1807; Bell's Prin., sec. 1479); as are also shares of companies, whether public or private, and government stock. (Bell's Prin., *ut supra* and cases given.)

767. Arrears of the annual returns of debts and funds, themselves heritable, are moveable. To this class belong arrears of rents and feu-duties, arrears and savings of interest on heritable bonds, reversions of the price of land sold judicially. Even though secured on land, these are regarded simply as cash in the hands of the person in right of them. (Ersk. ii. 9. 64; Bell's Prin., *ut supra*.)

768. Where lands are sold by the owner, the price is moveable; but the reverse is the rule where the sale is by an apparent heir, the price in that case coming in place of the lands. (Emslie, Feb. 25, 1817; Bar. Hume, 197, 1856; Heron, May 30, 1856, 18 D. 917.)

769. Rights having a tract of future time, such as liferents and annuities, are heritable. (Stair, ii. 1. 4; Ersk. ii. 2. 6.)

770. *Accession*.—On the principles of accession, feu-duties and casualties of superiority, rents of land, interests of heritable bonds and annuities are heritable, though the arrears, as has been mentioned, are moveable. (Bell's Prin., sec. 1483, 4.) Rights connected with or affecting lands, though not feudalized, are heritable: such are servitudes, teinds, patronages, reversions, faculties and rights to challenge heritable deeds. (Ersk. ii. 2. 5.)

771. *Destination* operates in changing the natural character of incorporeal rights precisely as in the case of corporeal objects.

Thus the exclusion of executors in a personal bond will make it heritable. Sums directed to be laid out by trustees on heritable securities are heritable. (Dick, July 4, 1828; Bell's Prin. 1492.) Rents of lands and houses vest and become moveable at the legal terms of Whitsunday and Martinmas. (Carnegie, July 24, 1668.) Interest, where no conventional terms are stipulated, is in the same position as rent.

772. An adjudication before the legal term will carry the radical right to the subject, and with it the rent which vests at the term; arrestment after the term will carry the rent due at the term; and an adjudger following after an arrester will be postponed on the rent due at the term previous. (Ersk. ii. 14 and 11, 12; Bell's Prin., sec. 1504.)

## II.—*Of Succession in general.*

773. A proprietor is allowed, by the law of Scotland, to dispose both of heritage and moveables by gratuitous deeds, under certain restrictions arising out of the rights of his widow and children which have been already explained.

774. But it is where the proprietor has neglected to use this privilege that the law of succession, properly so called, comes into operation. In this case the law supplies the omission by disposing of the estate and effects of the deceased in the way in which it may reasonably be supposed that he would himself have disposed of them. As every man is presumed to be acquainted with the laws of his country, the fact of a man dying intestate is regarded as equivalent to a declaration on his part that he was satisfied with the arrangements of the law, and wished them to take effect.

775. The leading distinction between the laws of heritable and moveable succession are, that a preference is given to males; and the privileges of primogeniture are recognised in the former, not in the latter. (3 Stair, tit. 4; 3 Ersk., tit. 8.)

776. The person to whom heritage descends is called the heir,

whilst he who inherits the moveables is called the executor. Both characters may be united in the same individual, as in the case of a sole surviving child.

777. The whole estate of the deceased, heritable and moveable, is called his *hæreditas*; until taken up by the heir, it is known as *hæreditas jacens*. (Bell's Prin., sec. 1638.)

778. The person who takes the benefit of the *hæreditas* is called the representative of the deceased; is burdened with his debts; and, indeed, is legally regarded as the same person (*eadem persona cum defuncto*). (Ibid.)

779. *Opening of the Succession*.—The succession opens by natural, not by civil death. In the latter case there is no succession, the criminal's estate being forfeited to the Crown. (Hume, Crim. Law, 546.)

780. But the succession may open before death under the provisions of a strict entail, declaring certain acts to infer forfeiture of the estate, and its devolution on the next heir in succession. (See Entail.)

781. *Vesting*.—In order that a succession may vest in any particular person, he must possess the following requirements:—  
1. He must have been conceived at the opening of the succession, and be born alive; 2. must be legitimate; 3. a subject of the Queen, either by birth or naturalization; and 4. of uncorrupted blood, *i.e.*, not lying under a sentence of treason. (Bell's Prin. 1641.)

### III.—*Descent and Consanguinity as applicable both to Heritable and Moveable Succession.*

782. *Consanguinity*.—There are three lines of consanguinity—descending, collateral, and ascending. The descending and ascending are called lineal, in distinction to the collateral.

783. *Lineal descent* includes all issue, immediate and remote; and each generation forms a *degree*.

784. *Lineal ascent* comprehends parents and ancestry in the direct line, as high as evidence can reach.

785. *Collateral kindred*—i.e., brothers and sisters, uncles and nephews, aunts and nieces, and cousins—also descend from a common ancestor with the deceased, but do not follow each other in lineal succession.

786. Under the head of collaterals it is necessary to distinguish between full and half blood, and under the half blood between consanguinean and uterine.

787. *Full blood*.—Persons stand in this relation to each other who are born or descended of the same father and mother; such persons are said to be *german*.

788. *Half blood relations, consanguinean*, are persons born or descended of the same father, but not of the same mother.

789. *Half blood relations, uterine*, are persons born or descended of the same mother, but not of the same father. (Bell's *Pria.*, secs. 1647 to 1654.)

790. The law of heritable succession recognises no relationship between these two classes, and there is no succession in heritage of the one to the other *ab intestato* (Bell's *Pria.* 1654, sec. 2); but a different rule has recently been introduced in moveable succession. By 18 Vict., c. 23, sec. 5, it is provided, that "where an intestate dying without leaving issue, whose father and mother have both predeceased him, shall not leave any brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean, but shall leave brothers and sisters uterine, or a brother or sister uterine, or any descendant of a brother or sister uterine, such brothers and sisters uterine and such descendants, in place of their predeceasing parent, shall have right to one-half of his moveable estate."

791. Relationship, whether by the full or the half blood, is reckoned in Scotland to extend as far as propinquity is traceable by evidence. (Ersk. iii. 10. 2.)

IV.—*Of Heritable Succession.*1. *Of Intestate Heritable Succession.*

792. *Primogeniture and Preference of Males.*—The heritable estate descends to the lawful issue of the person who died intestate, and who was last “vest and seised” in the land—that is, feudally recognised as its owner in possession—and to the descendants of such issue; first, males succeeding in their order, and next, females succeeding as heirs portioners. The female issue of the eldest son exclude the second son and his issue, both male and female; next the second son succeeds, and his issue, male and female, the sons in their order, and the daughters as heirs portioners; and so on through all the sons and their issue. (Bell’s Prin. 1658 and 1660; Stair, iii. 4. 33; Ersk. iii. 8. 5.)

793. *Heirs Portioners.*—Failing male issue and their descendants, the female issue inherit equally—the issue of those who have died taking their mother’s rights. The succession of heirs portioners is *pro indiviso*,—that is to say, each succeeds to an equal right in the undivided estate; a legal form being provided, by which any one of them can enforce a division should they be unable to settle the matter extrajudicially, by arbitration or otherwise. (Jurid. Styles, vii. 329; Shand’s Prac. 605; Bell’s Prin., secs. 1695 and 1081; see also Bell’s Dic., voce Brieve of Division, and works referred to.)

794. There is no difference between daughters of a first and any subsequent marriage of the father. Stair, iii. 5. 11; Ersk. iii. 8. 13; Wallace, 1758, M. 5371; Smith, 1792, M. 5381.

795. The children of a daughter succeed to her in accordance with the ordinary laws of heritable succession; the sons and their issue taking first in their order, and failing them, the daughters as *heirs portioners*.

796. The eldest heir portioner has an exclusive right to the

mansion-house of an estate in the country without compensation to her sisters, and she is entitled to claim the portion of land which lies nearest it (Stair, iii. 8. 11 ; Ersk. iii. 8. 13) ; but she has no such right to a house in town, or to a country villa. (Wallace, Jan. 20, 1756, M. 5371.) She is also entitled to peerages, dignities, and titles of honour, which are not otherwise destined in the patents by which they are conferred. (Bell's Prin., sec. 1659.) These privileges are called her *præcipuum*.

797. She has also a preferable right to subjects which in their nature are indivisible, *e.g.*, a house in town, a villa, or a superiority ; but in these cases she must give compensation. When there are more superiorities or rights to feu-duties than one, they are divided like other subjects. (Peadie, Feb. 2, 1743, M. 5367 ; Rae, Nov. 30, 1809.)

798. The eldest heir portioner has likewise the custody of the title-deeds. (Rae, *ut sup.*)

799. *Representation*, or the right of the children of a descendant who has died before the opening of the succession to come into his place, which has recently been introduced into succession in moveables, has always been the rule in heritable succession. (See Text-writers, *ut sup.*)

800. *Collateral Succession*.—When the line of descent is exhausted, the succession, instead of ascending to the grandfather, deviates to the collateral line. Even amongst collaterals, except in the case of conquest, which will be afterwards considered, the rule is in favour of descent. Thus, on the death of a middle brother, his younger brothers, in their order, and their issue, succeed in preference to an elder brother or his issue. Elder brothers succeeding to younger are preferred in the inverse order,—*viz.*, from younger to elder upwards, each transmitting to his issue according to the ordinary rules. (Bell's Prin., sec. 1662.)

801. The brothers of a female succeed in preference to her

sisters, the order just mentioned being observed. When sisters succeed to each other, they do so as heirs portioners. The german or full blood, male and female, to the last traceable connexion, excludes the half blood. (Bell's Prin., ut sup.)

802. The half blood consanguinean follows the full blood, brothers first in the above order. If the brothers called to the succession are the issue of a former marriage, the youngest brother succeeds first, and gradually upwards; but if they are the issue of a subsequent marriage, the eldest succeeds first, and gradually downwards. (Ibid.; and Lady Clarkington, July 20, 1664, M. 14867.)

803. Sisters consanguinean succeed to brothers consanguinean as heirs portioners. The half blood uterine is excluded. (Bell's Prin., sec. 1665.)

804. *The Ascending Line.*—Failing collaterals, the father succeeds; he and his relatives excluding the maternal relatives. (Stair, iii. 4. 35; Ersk. iii. 8. 9.)

805. Heritage never ascends to the mother or her relatives; and even the mother's own estate, if it has once vested in her son or daughter, never passes to the maternal line again. (Ibid. 1668.)

806. *Ultimus Hæres.*—The Crown, as last heir, takes the estate on the failure of the three lines of succession stated. The Crown also succeeds where a bastard dies intestate, and without lawful heirs of his body, because a bastard having no father in the eye of the law, except as liable for aliment as above stated (*ante*, p. 50), can have no heirs but his own children. The widow of a bastard is entitled to terce; and the Sovereign, whether succeeding to a bastard or to a person lawfully born, must pay the debts of the deceased, as far as the value of the estate goes, but no further; and his creditors may attach the estate by proper diligence, calling as parties the officers of state as representing the Crown. (Stair, iii. 3. 47; Ersk. iii. 10. 1 Bell's Prin., sees. 1669, 1957.)



807. The Crown possesses corresponding rights to moveable property. (Bell's Prin., sec. 1937.)

808. *Conquest*.—Property otherwise heritable is called conquest, when it has come into the possession of the deceased by purchase, gift, or other singular title (*i.e.*, a title not inferring the character of heir) from a stranger, or from a relative to whom he would not by law have succeeded; whereas heritage proper is that to which he has succeeded as heir-at-law. (Bell's Prin., sec. 1670; Stair, iii. 5. 10; Ersk. iii. 8. 14.)

809. Though, generally, all heritable subjects thus acquired become conquest, the rule is not without exceptions. Thus, leases, personal bonds excluding executors, teinds, etc., are not conquest. (Ibid., sec. 1672.)

810. Property, moreover, which passes by destination, and which is taken up by the heir of provision by service, is not conquest, *e.g.*, an estate which comes to a middle brother by a deed of entail. (Ibid. 1674; Robison, 1859, 21 D. 905.)

811. If the heir of conquest has made up titles, the property will descend as heritage to his heir; but if he has not done so, and the property remains *in hæreditate jacente* of the acquirer, it will go to his heir of conquest. (Aitchison, March 7, 1829, 7 S. 558.)

812. A difference between the rules of succession in heritage and conquest exists where a middle brother or sister, or their issue, dies, leaving younger and elder brothers or uncles. In this case, and in this only, the rule comes into play, that, whilst heritage descends, conquest ascends. The younger brother, or uncle, takes the heritage; the elder the conquest; their issue succeeding them in both cases. (Bell's Prin., sec. 1671; see also, on the subject of Conquest, Stair, iii. 5. 10; Ersk. iii. 8. 14 and 15.)

813. *An heir apparent* is one who cannot be disappointed by the birth of a nearer heir, *e.g.*, an eldest son. (Ersk. iii. 8. 54; Bell's Prin., sec. 1677.)

814. *An heir presumptive* (a term scarcely known to the law of

Scotland) is one who may be so cut off; *e.g.*, a brother, where no son is yet born. An heir presumptive becomes an heir apparent after the succession has opened, and he is entitled to take it as heir-at-law; but before he has completed his titles. An heir apparent is also an heir presumptive before the opening of the succession. (Bell's Prin., sec. 1677.)

815. An apparent heir may enter into possession of lands and levy the rents, but he cannot remove tenants who derive their right from the deceased proprietor. (Bell's Prin., sec. 1682.)

816. His right to the rents runs from the period when the succession opened, so that, on his own death, his executors would take the unlevied rents, or the interest of the price of lands sold. (Ibid.)

817. He may bring the estate to judicial sale for debt, even although it be not bankrupt. (1695924, Bell's Prin., sec. 1684.)

818. *Annus Deliberandi*.—In accordance with the civil law (Dig. Lite xxviii. 8), a year is allowed to the heir, computed either from the ancestor's death, or from his own birth, if posthumous, for deliberating whether he shall take up the succession, or decline to incur the responsibility for debt which it implies. (Stair, ii. 12. 28, and iii. 5. 1; Ersk. iii. 8. 54.) This privilege is limited by 21 and 22 Vict., c. 76, sec. 27, which provides that "actions of constitution and adjudication against an apparent heir on account of his ancestor's debt or obligation, for the purpose of attaching the ancestor's heritable estate, and actions of adjudication against such heir on account of his own debt or obligation, for the purpose of attaching such estate, may be insisted in at any time after the lapse of six months from the date of his becoming apparent heir."

## 2. *Of Heritable Succession by Deed.*

819. Heritable property can be conveyed in Scotland only by a *disposition*, or deed which sets forth a transaction ostensibly

between living persons, and cannot be transmitted by last will or testament, even though the latter deed should have been executed in a country by the law of which real property can be so conveyed. An extreme anxiety to protect heirs-at-law from being hurt by deathbed deeds, seems to have been the reason of adopting in Scotland a rule unknown to the civil law, and at variance with the laws of most European countries.

820. But this rule does not prevent a man from effectually settling his heritage in a deed possessing the other characteristics of a testament, provided he uses, in the clause in which the heritage is conveyed, the words *give, grant, and dispo*ne, in place of *legate* or *bequeath*. (Mitchell, M. 8092 ; Robertson, M. 15947 ; Bell's Prin., sec. 1692.)

821. The fiction on which a deed of this nature proceeds, is that the grantee becomes the proprietor ; and the actual possessor accordingly reserves to himself, in a separate clause, his own liferent, and a power to revoke the conveyance.

822. A conveyance will be effectual though it be in general terms, as "of all lands and heritage belonging to me ;" but such a clause will not carry the right to a succession which has not opened to the disponent during his life. Such a right must be specially conveyed. (Leitch, Feb. 17, 1829, H. of L., 8 W. S. 366.)

823. *Substitutions*.—It is not unusual for a disponent to nominate several persons who shall be entitled to the estate, in an order which he also specifies. The first disponent in this case is called the *institute*, the others *substitutes* or *heirs by destination*. (Bell's Prin., sec. 1693.)

824. *Technical Words*.—Where technical words are used, either in describing the several classes of heirs or otherwise, the rule in construing the deed is to adhere to the received meaning of such words, whatever may appear to have been the meaning attached to them by the disponent. Where technical words are not used,

the deed will be construed according to the apparent *voluntas testatoris*, which will be collected from its whole strain and purport. Such words thus come to be important, whether our object be to use them correctly, or to avoid their use.

825. *Heir* includes all those who are heirs by law, viz., heirs of line, heirs of conquest, and heirs of investiture.

826. *Heir-male* is a male connected by males, and excludes not only females, but males connected by females.

827. *Heir of line* is synonymous with *heir-at-law*, *heir general*, *heir whatsoever*, and the *heir of conquest*. (Bell's Prin., sec. 1696.) *Heir* may sometimes mean *of line*, is also used as distinguished from heir of conquest, though *both* are heirs-at-law.

828. *Heir-male of line* means the *heir-male*, excluding the *heir of conquest*.

829. *Heir-female* is the *heir-at-law*, male or female, failing *heirs-male*.

830. *Heir-male of the body*, in contradistinction to the heir-male, is not necessarily a son of the disposer, but must be in the direct line of descent.

831. *Heir whatsoever*, or *heir whomsoever*, is in general equivalent to *heir-at-law*. (Bell's Prin., sec. 1701.)

832. Heir by destination (*vide* Substitutions, *supra*, p. 137).

833. Ambiguity may arise in point of time. The rule in construction is, that the reference is not to the time of making the deed, but to the opening of the succession. (Roxburgh's Case, June 23, 1807, M. App. 30 ; *vide* *Tailzie* ; Shepherd, Dec. 1, 1836, affirmed, 3 S. and M. 255.)

834. *Simple Destination*.—The heirs of the donee are in general included ; but the immediate substitution of one person for another excludes the heirs of the institute, except in deeds by parents to children. (Bell's Prin. 1704 and 1776.)

835. *A clause of return*, is a provision that the subject shall return to the granter and his heirs. Such a clause will in no

case be effectual against onerous deeds or the diligence of creditors. (Ersk. iii. 8. 45; Bell's Prin. 1705.)

836. *A power to name* heirs may be given; and, if duly exercised, the nomination is effectual. (Stewart, May 15, 1821, H. of L., 2 W. and S. 369, and 5 W. S. 515.)

837. *Limited Destination* includes—1. destinations in fee and liferent; 2. substitutions, with simple prohibitions; 3. entails; 4. conditional settlements.

838. *Fee and Liferent*.—The unlimited right of possessing and disposing of property is called the fee; the limited right of usufruct during life is called the liferent. These rights may subsist at the same time either in the same or in different persons; and either of them may be held by one, or by two or more persons. (Bell's Prin. 1710, 1037.)

839. *Conjunct Fee and Liferent*.—Conjunct rights in the persons of husbands and wives, or parents and children, are usually created by marriage contracts (*ante*, see Marriage Contract), and are governed by their provisions.

840. Where the conjunct fee and liferent is in favour of strangers and their heirs, the two are equal fiars during their joint lives; but after the death of the first the survivor has his own fee of one half, and the liferent of the other. After his death the fee is divided equally between the heirs of both. (Ersk. iii. 8. 35; Bell's Prin., sec. 1709.)

841. If no mention is made of liferent, and the right be to two jointly and their heirs, the conjunct fiars enjoy the subject equally while both are alive; but on the death of the first, both the fee and liferent of his half descends at once to his heir. In a right to two jointly, and the longest liver and their heirs, the words *their heirs* denote the heirs of the longest liver.

842. If the right be to two and the heirs of *one* of them, he alone is fiar; the right of the other resolving into a naked liferent. (Bell's Prin. 1709; Stair, ii. 3. 42; Ersk. iii. 8. 35.)

843. *Substitutions with Prohibition to Alter.*—Such deeds are not entails unless the other conditions of the Entail Acts are complied with, and third parties consequently are not affected by them. They are personal contracts simply, with a condition annexed to the conveyance, the effects of which are limited to the heirs, even heirs being bound by them only according to a rigid construction of their terms. (Bell's Prin. 1716, *et seq.*)

### 3. *Of Entails.*

844. An entail, or, as it is frequently called in Scotland, a *tailzie*, from *tailler*, to cut, properly signifies any destination by which the legal course of succession is cut off, one or more of the heirs-at-law being excluded or postponed. In its usual acceptation, an entail is a destination of landed property, by which a line of succession, differing from that of the common law, is fixed in perpetuity.

845. Entails were formally legalized in Scotland by the statute 1685, c. 22. Previous to this period, deeds containing clauses whereby the debts and deeds of the heir in possession were rendered null, and his own right declared to be extinguished if he contravened the provisions of the settlement, had begun to be framed by conveyancers. These clauses are said to have been devised by Sir Thomas Hope, Advocate to King Charles I., and they were supported by a single decision of the judges; but Mr Erskine is warranted by Lord Stair, and others of our earlier writers, when he tells us that they were generally accounted “not only contrary to good conscience, as they cut off the right of the lineal heir, but inconsistent with the genius of our law, as they sunk the property of land estates and created a perpetuity of liferents.” (Ersk. iii. 8. 25.) In following the course of legislation, we shall see to how great an extent the current of public opinion on this subject has returned to the channel from which the influence of the aristocracy for a time diverted it.

846. The original Entail Act, 1685, c. 22, provides that it shall be lawful to tailzie lands and estates; to substitute heirs with such provisions and conditions as the entailer shall think fit; and to insert irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell or otherwise dispose of the said lands, or any part thereof, or contract debt, or do any deed whereby the estate may be apprised, adjudged, or evicted, or the succession frustrated or interrupted.

847. All such deeds are declared null, and the heir next in succession empowered, immediately on contravention of the provisions of the entail, to pursue a declarator, and serve himself heir to the last heir who died infeft and did not contravene.

848. A register of entails is also instituted *ad perpetuam rei memoriam*; and provision is made that the same clauses contained in the first shall be repeated in every subsequent conveyance of the tailzied estate. It is declared that omission to repeat these clauses shall be a contravention of the entail against the person and his heirs omitting to insert them, whereby the estate shall *ipso facto* devolve to the next heir; but such omission shall not militate against creditors and other singular successors contracting *bona fide* with the person infeft in the estate, but without the said clauses in the body of his right.

849. It was not till after the lapse of a century that the inconveniences arising from the stringent character of this enactment led to further legislation.

850. The first relaxations were entirely in favour of the estates, which were found to be as much prejudiced as their possessors and the public by the fetters imposed by the first Act. Of two statutes passed in the same year, 20 Geo. II., the first (c. 50) enables heirs of entail holding superiorities to sell these superiorities to their vassals, so as to make the vassals hold directly of the Crown; and the second (c. 51) entitles heirs of entail in possession to sell their estates to the Crown, the money

to be invested in land, to be settled according to the destination of the tailzie; whilst the sole object of the well-known Montgomerie Act (10 Geo. III., c. 51) was to encourage the agricultural improvement of lands held under entail, by relieving the heirs from impediments to granting leases, and empowering them, under certain regulations, to charge against future heirs a proportion of the expenses of improvements on their estates.

851. The Aberdeen Act was subsequently passed (5 Geo. IV., c. 87), to authorize the proprietors of entailed estates in Scotland to grant provisions to their wives or husbands and younger children. It was provided by this Act, that only two liferent provisions should subsist at one time; and they were limited in amount, in the case both of husbands and wives, to a certain proportion of the free rental. The provisions to the children were payable only from the rental after deduction of the annuities; and the greatest sum payable, however numerous the family, was restricted to three years' rental of the estate. It was expressly enacted that none of these provisions should be made by any process of law to affect the fee of the estate, but that, after the granter's death, they should be paid by the heir out of the yearly rents or proceeds.

852. The concluding section of the statute was to the effect that in no case should the heir in possession be deprived of more than two-third parts of the clear annual income.

853. In a very few years the last clause of the Aberdeen Act came to describe the position of a large number of heirs of entail, and relief was sought from the burdens under which they laboured by the Rosebery Act (6 and 7 Will. IV., c. 42), the leading object of which, in addition to increasing the powers of heirs of entail with respect to leases and excambions, was to "empower the Court of Session to authorize the sale of entailed lands for the payment of certain debts affecting the same." But it was only the debts of the maker of the entail that were



authorized to be thus discharged. This enactment was followed by the two comparatively unimportant Acts, 3 and 4 Vict., c. 48, "to enable proprietors of entailed estates to feu or lease on long leases portions of the same for the building of churches and schools, and for dwelling-houses and gardens for the ministers and masters thereof," and 4 and 5 Vict., c. 24, to amend the Montgomerie Act, by declaring that in contracts of excambion it shall not be necessary to insert the whole destination of heirs substitutes, or the conditions and provisions, provided that reference be made in the contract to the original entail.

854. We have now arrived at the Act for "the Amendment of the Law of Entail in Scotland" (11 and 12 Vict., c. 36, 14th August 1848), commonly called the Rutherfurd Act, which, proceeding on the preamble that the law of entail in Scotland has been found to be attended with serious evils, both to heirs of entail and the community at large, modifies it extensively, in conformity with the views on the subject which had already found legislative expression in England.

855. The following are its leading provisions:—

856. (1.) Any heir of entail, born after the date of the entail, being of full age and in possession, under an entail dated on or after 1st August 1848, may disentail the estate in whole or in part, under the authority of the Court of Session; and any such heir born before the date of such entail, and in possession, may do so with consent of the heir next in succession, being heir apparent under the entail, of 25 years of age, and born after the date of the entail.

857. (2.) Any heir in possession under an entail dated before 1st August 1848, may disentail, if born on or after that date. Any heir of entail born before 1st August 1848, of full age and in possession under a deed of prior date, may disentail, with consent of the heir next in succession, being heir apparent, born after 1st August 1848, and 25 years of age.

858. (3.) Any heir of entail, of full age and in possession under an entail existing prior to 1st August 1848, may disentail, if he be the only heir of entail in existence and unmarried, or shall have obtained the consents of the whole heirs of entail, if there be less than three in being, or otherwise of the three nearest heirs for the time entitled to succeed, or lastly of the heir apparent, and of the heir or heirs, in number not less than two, including such heir apparent, who in order successively would be heir apparent, provided that the nearest heir for the time shall be of the age of 25 complete, and not subject to legal incapacity.

859. (4.) The heir of entail, of full age and in possession, may sell, charge with debt, lease, and feu with the like consents as enable him to disentail.

860. (5.) The heir under an entail existing prior to 1st August 1848, may excamb with the like consents.

861. (6.) The party applying to the Court for authority to disentail, sell, alienate, dispoise, charge with debts, lease, feu, or excamb, shall make affidavit to the effect, either that there are no entailer's or other debts, and no provisions to husbands, widows, or children; or, if there are such encumbrances, setting them forth, principal and interest, in order that, if the Court shall see cause, intimation of such application may be ordered with a view to the persons in right of the same appearing for their interest, and the Court shall order provision to be made for such debts or provisions, or for the protection of the parties in right of them, before granting the authority sought; and any person who shall wilfully make such affidavit falsely shall be guilty of perjury.

862. (7.) Creditors, or persons in right of a provision to a husband, widow, or younger child, who, before the expiry of one year from the date of recording the instrument of disentail, shall use inhibition, shall not be affected by such instrument of disentail.

863. (8.) Where by marriage-contract the descent of the estate upon the issue of the marriage shall have been secured, it shall not be competent for the heir in possession to apply for disentail until there shall be a child born of such marriage, who shall consent to the disentail by himself or his guardians, or until such marriage shall be dissolved without a child, unless the trustees named in the contract shall concur in the application.

864. (9.) Heirs who shall, prior to the date of the Act, have borrowed money on the security or credit of their right of succession, under an entail dated prior to 1st August 1848, shall not consent in opposition to their creditors, unless adequate security be given to the satisfaction of the Court.

865. (10.) Heirs apparent who shall borrow money subsequently to the passing of the Act are similarly restrained, but other heirs substitute are not.

866. (11.) Any creditor of an heir empowered to disentail, but who has not done so, may affect the estate for payment of his debt.

867. (12.) The Acts 10 Geo. III., c. 51, and 5 Geo. IV., c. 87 (Montgomerie and Aberdeen Acts), shall not apply to tailzies dated after 1st August 1848; their provisions being superseded by the provisions of this Act.

868. (13.) An heir having obtained degree under the Montgomerie Act for expense of improvements, may grant a bond of annualrent of a tenor which is prescribed.

869. (14.) An heir, in future, expending money in improvements, may grant a similar bond of annualrent.

870. (15.) When improvements have been executed and recorded under the Montgomerie Act by an heir who has died without executing a bond of annualrent, it shall be lawful for his executor to call on the heir in possession to grant such bond.

871. (16.) Where improvements have been executed, but the

provisions of the Montgomerie Act have not been complied with, it shall be lawful for the heirs in possession to apply by summary petition to the Court, for authority to grant bond of annualrent; and if it shall appear to the Court that the improvements are of the nature contemplated by the said Act, and that the expenditure was *bondâ fide* made, they shall grant warrant for execution of the bond, as in the case of improvements for which decree in terms of the Act has been obtained.

872. (17.) So long as an entailed estate remains subject to the tailzie, or is not liable to be disentailed by the heirs in possession without the consent of any other party, no bond of annualrent shall be made the ground of adjudication or eviction of the estate or any part thereof; and the annualrents contained in such bond shall be recoverable out of the rents and profits of the estate, and from the heir in possession for the time being, and such heir shall be bound yearly to pay and keep down such annualrents; and no remedy shall be competent to a creditor under the bond for arrears beyond two years' annualrent, interest and penalties, without prejudice to his remedy against the heir personally and his representatives.

873. (18.) In all cases in which it may be competent, or an heir may be called upon to grant a bond of annualrent, it shall be lawful for such heir, and he may be called upon, to charge the fee and rents of such estate, other than the mansion-house, offices, and policies, with two-thirds of the sum on which the amount of such bond of annualrent, if granted, would be calculated in the terms of this Act, by granting, in favour of any creditor who may advance the amount of such two-thirds, bond and disposition in security over any portion of the estate other than as aforesaid for such amount, with interest till repaid.

874. (19.) Any bond of annualrent, or bond and disposition in security, granted under the authority of this Act, shall operate as a discharge of all claims on account of the improvements for

which they have been granted against the estate and the heirs of entail succeeding thereto, except the claims under the head of annualrent or bond and disposition in security.

875. (20.) Private roads are to be deemed improvements.

876. (21.) Provisions to younger children under the Aberdeen Act, or in virtue of powers contained in the deed of entail, may be made charges on the entailed estate by bond and disposition in security over the estate, other than the mansion-house, offices, and policies.

877. (22.) The heir in possession is to pay yearly and keep down the interest on provisions to children, and the remedy competent to the creditor against the fee and rents shall be limited to the principal sum and two years' interest thereon, and corresponding penalties, without prejudice to his personal remedy against the heir or his representatives, or separate estate, including the rents of the entailed estate during possession.

878. (23.) Provisions to children are not to be charged without authority of the Court.

879. (24.) Notwithstanding any limitations in the entail, it shall be lawful for the heir in possession, upon notice to the heirs next entitled to succeed, and with the approbation of the Court, to grant feus or long leases, such feus or long leases not exceeding in all one-eighth part in value, for the time, of such estate; but it shall not be lawful for the heir to take any grassum, or fine, or valuable consideration, other than the tack-duty or rent, nor to grant any such feu or lease of the mansion-house, offices, or policies. In case any such grassum or other consideration shall be taken, or any feu or lease hereby prohibited shall be granted, they shall be null and void, unless it be in accordance with more extensive powers contained in the tailzie itself.

880. (25.) In all cases in which it is competent to charge the estate with debt, the heir in possession may sell any portion of the estate other than the mansion-house, policies, and offices,

which may be necessary, and which the Court may select as most suitable to be disposed of, for payment of the debt ; and it shall be lawful for the heir to grant, at the sight of the Court, a valid disposition or dispositions in fee simple to the purchaser of the portion or portions sold accordingly. The price shall be approved of and paid into Court by the purchaser, who shall be fully discharged by such payment ; and shall be applied at the sight of the Court to the extinction of the debt. If the surplus, after paying the debt, is more than two hundred pounds, it shall be invested in other lands to be added to the remainder of the estate, or applied in payment of the entailer's debts, or of any money charged on the fee of the estate, or in redemption of the land-tax, or in permanently improving the estate, or in repayment of money already expended in improvements.

881. (26.) If other lands be purchased to be added to the estate, the tailzie of such lands shall be taken to be of equal date with the original tailzie of the estate. If the surplus be less than two hundred pounds, it shall be paid over to the heir in possession for his own use and behoof ; all at the sight and under the direction of the Court of Session.

882. (27.) Money derived from the sale of an entailed estate, or of any right or interest in or concerning the same, or in respect of any permanent damage done to the estate under a private or other Act of Parliament, or where money has been invested in trust for the purpose of purchasing lands to be entailed on the series of heirs entitled to succeed under the entail, or where money would fall to be invested under the provisions of the entail, and where the heir in possession could, by virtue of this Act, acquire such estate in fee simple, such money may be paid to the heir in fee simple ; but if the heir of entail shall not be entitled to acquire the estate in fee simple, he may, with the approbation of the Court, lay out such money in payment of the entailer's debts, or in payment of any money charged on the fee

of the estate, or in redemption of the land tax, or in permanent improvements, or in payment of money already expended on improvements.

883. (28.) Money vested in trust for the purchase of land to be entailed, may be dealt with as if it were the entailed land.

884. (29.) The date of the Act of Parliament, or deed of trust directing land to be entailed, shall be held to be the date of the entail.

885. (30.) Provisions to wives and children may be granted out of money vested in trust for the purchase of lands to be entailed.

886. (31.) If a creditor, acting under powers of sale contained in a bond or disposition in security, shall sell lands in manifest excess of what is necessary to pay the debt affecting the estate, the surplus shall be reinvested in land to be placed under the same provisions; but if such surplus shall not exceed two hundred pounds, it shall be paid to the heir in possession for his own use.

887. (32.) Guardians to be appointed by the Court, in the course of the application, may consent for persons under age, or subject to legal incapacity.

888. (33.) A form for the instrument of disentail is furnished in the schedule to the Act, and the Keeper of the Register of Tailzies is instructed to record it, along with the decree on which it proceeds, for a fee to be fixed by Act of Sederunt; and such instrument, when recorded, shall have the effect of freeing the heir in possession from the fetters of the entail; but such instrument of disentail shall in no way defeat or affect injuriously any charges, burdens, or incumbrances, held by third parties, other than the rights and interests of the substitutes in the entail.

889. (34, 35, 36, and 37), Have reference to the form of the applications to be presented to the Court, the intimation required to be given in the *Gazette* and the newspapers, the procedure in

Court, and the heirs whom it shall be requisite to call as parties to the proceedings.

890. (38.) Provides that excambions under the Rosebery Act (6 and 7 Will. IV., c. 42) may be carried through under the forms of this Act, and recorded in the Register of Tailzies.

891. (39.) Instruments of disentail shall be final, unless the judgment of the Court on which they proceed has been appealed from to the House of Lords, or brought under reduction during the period within which it might have been appealed from.

892. (40.) In future entails, the clause of registration shall, in every respect, have the same operation and effect as the most formal irritant and resolute clauses; and it shall not be necessary that such clauses be inserted in order to render the tailzie effectual in terms of the Act 1685.

893. (41.) No irritancy committed by an heir in possession shall affect conveyances to purchasers, or securities to *bond fide* onerous creditors.

894. (42.) The provisions of the English statute (39 and 40 Geo. III.), entitled, "an Act to restrain all trusts and directions in deeds and wills, whereby the profits or produce of real or personal estate shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited," are extended to Scotland. By this statute the period of accumulation is restricted to twenty-one years after the death of the grantor, or the minority of the parties interested.

895. (43.) Acts permitted by this Act may be done by heir of entail, though the deed of entail be not recorded nor the heir infeft.

896. (44.) An entail defective under the Act 1685, in any one prohibition, shall be invalid and ineffectual as regards all the prohibitions. This clause alone has swept away a very large proportion of the entails of Scotland.

897. (45.) The instrument of disentail may be registered in



the Register of Sasines, either in the county in which the lands lie, or in the General Register at Edinburgh.

898. (46.) No irritancy or forfeiture shall be incurred for anything done under this Act.

899. (47.) Act 1685 to remain in force, except as affected by this Act.

900. (48, 49, 50), Enact that the Act shall not be defeated, and parties shut out from its benefits, by trusts, liferents, or leases.

901. The only subsequent statute on this branch of our law is the 16th and 17th Vict., c. 94 (20th August 1853), the object of which is to extend the benefits and facilitate the operation of the Rutherfurd Act, the provisions of which are stated in the preamble to have been highly beneficial. In accordance with this design, the first six sections make provision for forms of procedure more expeditious and economical than those contemplated by the former statute; it being provided by the first section that these forms are merely directory, and that no judgment shall be reduceable on the ground of want of compliance with them.

902. The 7th section provides that a bond and disposition in security for provision to a younger child, may be granted to any party advancing the amount thereof.

903. (8.) Money placed in trust prior to 1st August 1848 to purchase land to be entailed, may be partly invested in land, and partly employed for the benefit of such land.

904. (9.) Sales may be made to pay off the entailer's debts, though not validly charged on the fee of the estate.

905. (10.) Where, at passing of this Act, entailed estates may be sold under judicial authority, parties entitled to sale may make application to the Court, in the form prescribed by the Rutherfurd Act.

906. (13.) Where a tailzie, executed after 1st August 1848, does not expressly prohibit granting of feus and building leases,

though it shall contain a prohibition against alienation and long leases generally, the heir in possession shall have the same powers of granting such leases for more than twenty-one years, as are conferred by the Rutherford Act on heirs under tailzies dated prior to 1st August 1848.

907. (14.) Heirs in possession entitled to sell portions of estates under the Lands Clauses Consolidation Act (8 and 9 Vict., c. 19), may do so to any company authorized to acquire the same, in consideration of an annual feu-duty or ground-annual.

908. (15.) But the company shall not pay, nor shall the heir take, any grassum, fine, premium, or consideration in the nature thereof. The amount of the feu-duties or ground-annuals, in case of difference, to be settled by valuers as under the Lands Clauses Act.

909. (16.) All feu-duties payable by a company to be a first charge on the revenues of the company.

910. (20 and 21.) Neither heir nor heir apparent shall give consents where they are opposed by heritable creditors.

911. (22.) Bonds and dispositions in security may contain power of sale.

912. By the 4th section of the recent Act, "to regulate the distribution of business in the Court of Session" (20 and 21 Vict., c. 56), it is enacted that petitions and applications, under any of the various statutes now in force relative to entails, shall, in common with other summary petitions and applications, be brought before the Junior Lord Ordinary officiating in the Outer House, and shall not be taken before either of the two Divisions of the Court as formerly.

#### *4. Of Conditional Settlements.*

913. Settlements to land may be dependent on other conditions than the limitations of an entail; and these conditions may be either implied or express.

914. 1st. *Implied Conditions*.—The only condition that is generally implied is, that the conveyance shall be effectual only *si testator sine liberis decesserit*, i.e., if the maker of the settlement shall die without lawful issue. Even this presumption, however, may be defeated by evidence, or by opposite presumptions. (Bell's Prin., sec. 1776–1780.)

915. 2d. *Express Conditions*.—The rule as regards express conditions is, that if they be intelligible they shall be effectual, unless they are:—1. Beyond the power of the maker of the deed; 2. Impracticable; 3. Inconsistent with law; or, 4. Contrary to morals—*contra bonos mores*. In these cases they are held *pro non scriptis*, and the destination is the same as if no condition had been annexed to it. (Ibid. 1781–1785.)

### 5. *Of the Law of Deathbed.*

916. If any man, whilst ill of the disease of which he died, has conveyed or burdened his heritable estate, to the prejudice of his lawful heir, he is presumed to have acted under impotency, and his heir is entitled to reduce the deed.

917. This rule, which has no equivalent in England, belongs to the most ancient consuetudinary law of Scotland. It is manifestly referable to the same principle with the prohibition to convey heritage by will, and like it, in all probability, as Lord Stair suggests, was intended as a protection against the notorious propensities of the priesthood. (2 Reg. Maj., c. 18, secs. 7 and 9; Stair, iii. 4. 28; Stair, iv. 20. 38; Ersk. iii. 8. 95.)

918. The two tests which have been fixed upon as establishing that degree of vigour which, in opposition to *deathbed*, is called *liege poustie* (*legitima potestate*), are—1. Survivance for sixty days; and, 2. Going to kirk or market “without suppotation or straining of nature,” and conducting himself in the ordinary manner. It would be of no consequence though the express object were to evade the law of deathbed, if the individual was

in a condition to take part in the service at church, or to buy or sell in the market. (1696, c. 4; Richardson, July 30, 1635, M. 3291; Act of Sederunt, 29th Feb. 1692; Faichney, 9th July 1776, M. App., Deathbed, No. 1; Maitland, 16th May 1815, F. C.; Rait, 27th November 1818, F. C.) Where the latter defence is made to a reduction on the ground of deathbed, questions of much nicety in point of fact invariably arise, and these are usually referred to a jury.

919. Extreme old age, if accompanied by manifest indications of the approach of death, will be equivalent to disease; but the deed of the oldest or most infirm man, or of the man who is labouring under the most mortal sickness, will not be reducible if he has either died of another disease, or been killed by an accident,—it being held that, in either case, he might have survived the requisite sixty days. (Mackay v. Davidson, 17th Jan. 1828, H. of L., 1831; Bell's Dic., *vide* Deathbed.)

920. In computing the sixty days, the day of signing is not reckoned; but it is sufficient that the sixtieth day shall have been begun, according to the brocard, *Dies inceptus pro completo habetur*. (Crawford, July 27, 1782, 2 Hailes 907.)

921. If the deed has been antedated on purpose to meet the objection of deathbed, it will be reducible, whatever may be its true date, in respect that it is a deed vitiated in *essentialibus*. (Merry, Feb. 6, 1801, M. App.; voce Writ, No. 3, affd. in H. of L.)

922. Leases for adequate rents granted, and in the ordinary course of management, are not reducible; but all leases for unusual periods, extraordinarily low rents, or where a grassum or other valuable consideration has been received, fall under the law, because they are alienations of heritage in substance, though not in form. (Semple, June 1, 1813, F. C.; Boyle, June 19, 1759, M. 3235.)

923. Onerous deeds,—that is to say, deeds to execute which

the granter obliged himself, either by the contraction of debts or otherwise, whilst in *liege poustie*,—are binding, though executed *in lecto*, because these deeds are not really hurtful to the heir, who would have been bound by his ancestor's obligation. (Ersk. iii. 8. 97 ; Gillespie, June 18, 1802, Hume 145.)

924. Any heir, or apparent heir, is entitled to reduce, provided he can prove injury, and has not ratified the deed by his own act. The creditors of heirs possess a similar right of challenge, and this right cannot be defeated by the consent or ratification of the heir. The heir will not be held to have ratified the deed, if, at the period of consenting or of acting on it, he was a minor. (Bell's Prin. 1815 ; Shaw v. Campbell's Executors, March 2, 1847 ; Richardson v. Richardson, March 8, 1848.)

925. The law of deathbed, though strictly confined to heritable subjects, affects such moveables as are heritable by destination, or as affect the interests of the heir. Thus, heirship-moveables, moveable bonds secluding executors, and all other moveable bonds, where the moveable estate of the granter is not sufficient for satisfying his personal debts, may be reduced by the heir. (Ersk. iii. 8. 98 ; Cowie, July 22, 1707, M. 3220.)

926. *Mental Alienation*.—Heritable conveyances, like all other deeds, may be reduced on the ground of unsoundness or imbecility of mind. (See Guardianship of the Insane.)

#### 6. *Of the Entry of the Heir.*

927. It was formerly mentioned (see Heritable Succession by Deed), that, in the transmission of heritable property from an ancestor to an heir, the form is that of a conveyance from one living person to another. It follows, as a natural consequence of this rule, that, when his right to the succession has been judicially recognised, the heir makes up his titles to the estate in the same manner as if it had been conveyed to him by sale or gift during the lifetime of the ancestor.

928. The constitution and transmission of rights in land will fall more properly to be treated under the head of Sale ; and the only branch of the subject which here requires notice, is that which has reference to the proceedings by which the fact of heirship is judicially ascertained.

929. *Entry by Service*.—A service was formerly the verdict of a jury on the rights of a claimant to the heritage of the deceased. If the claim was to lands in which the deceased was feudally vested, the service was called *special* ; if to those to which he held personal rights, it was a *general* service, though, in violation of etymology, the special often embraced the general, not the general the special service.

930. The trial took place in obedience to a brieve or precept from the Sovereign, which was issued from Chancery at the request of the claimant, and directed either to the Sheriff of the county in which the lands lay, or, where the lands lay in several counties, to the Sheriff of Edinburgh, if the service was a special one ; or to any sheriff or burgh-magistrate if it was a general one.

931. The proceeding is now regulated by 10 and 11 Vict., c. 47, by which very extensive changes have been made on the former practice.

932. The brieve from Chancery is abolished, and services are directed to proceed by petition to the Sheriff of the county where the deceased was domiciled, or to the Sheriff of Chancery, at the option of the petitioner ; and this whether the service be general or special. (Sec. 2.) If the deceased had no domicile in Scotland, or if the claim be for special service to lands in different counties, the petition is competent to the Sheriff of Chancery only. (Sec. 3.)

933. The conditions of entail, and all other burdens, conditions, and limitations, may be referred to in the petition, instead of being inserted at length. (Sec. 5.)

934. When the petition has been duly intimated and published in accordance with the provisions of the Act (sec. 7), and the prescribed periods have elapsed, the Sheriff shall, by himself, or by the provost, or any of the bailies of any royal burgh, who are thereby authorized to act as commissioner of such Sheriff without special appointment, or by any commissioner whom such Sheriff may appoint, receive all such evidence, documentary and parole, as might competently have been laid before the jury summoned under the brieve of inquest, and any parole evidence shall be taken down in writing, and a full and complete inventory of the documents produced shall be made and certified by the Sheriff or his commissioner; and on considering the said evidence, the Sheriff shall, without the aid of a jury, pronounce judgment, serving the petitioner in terms of the petition, in whole or in part, or refusing to serve him and dismissing the petition, in whole or in part; and this judgment shall be equivalent to and have the full legal effect of the verdict of the jury under the brieve of inquest, according to the practice theretofore existing. (Sec. 10.)

935. In the event of a competing petition, it shall be lawful for the Sheriff to dispose of the petitions, either together or separately, after the same manner. (Sec. 11.)

936. The petition, with the judgment of the Sheriff annexed, is directed to be transmitted to the Director of Chancery or his depute, by whom it shall be recorded, and an authenticated extract prepared and delivered to the party; and this extract shall be equivalent to an extract of the retour under the former brieve of service. (Sec. 14.)

937. These proceedings may be advocated to the Court of Session for jury trial; and where the Sheriff has refused to serve the petitioner, or dismissed his petition, or repelled the objection of an opposing party, his judgment may be brought under review by a note of advocacy. (Sec. 17.)

938. A decree of special service, thus obtained, besides operating as a retour, shall have the effect of a disposition by the deceased to the heir, who shall be entitled to make up his titles to the estate in the usual form. (Sec. 21.)

939. It is provided, that in future no decree of special service shall operate or be held equivalent to a general service to the deceased, except as to the particular lands thereby embraced, and that it shall infer only a limited passive representation of the deceased; and the person thereby served shall be liable for the deceased's debts only to the extent or value of the lands embraced in the service, and no further. (Sec. 23.)

940. The heir of line, or heir-male, may petition for a general service in the same petition in which he asks for special service, and without further notice or publication. (Sec. 24.)

941. A general service may be applied for, and obtained to a limited effect, by annexing a specification to the petition; and such service shall infer only a limited passive representation to the extent of the relative specification. (Sec. 25.) This provision comes in place of the former service, *cum beneficio inventarii*.

942. It is expressly provided that the statute shall not affect the entry of heirs by precept of clare constat, or the service and entry of heirs *more burgi* in burghs, in tenements held burgage. (Sec. 26.)

943. *Entry by Writ of Clare Constat.*—This is a form of voluntary recognition on the part of the superior, by means of which the heir may frequently be spared the expense and trouble of a service. (Ersk. iii. 8. 71.)

944. What was called a *precept of clare*, was an injunction from the superior to his bailiff to infeft the person in whose favour it was granted, *quia mihi clare constat*, etc.,—that the defunct died last vest in the lands, and that the claimant is his heir. On this precept an instrument of sasine was expedite and recorded. (Ib.)

945. The recent "Titles to Land" Act (21 and 22 Vict., c. 76) having rendered the use of the instrument of sasine optional,



provides (sec. 11), that in place of the superior directing that the person applying to him shall be infeft, he shall merely declare that he is the heir of the last vassal; that it shall be competent to record this *writ* of clare constat—as, in accordance with the change in its substance, it is instructed to be called—in the Register of Sasines; and that, when thus recorded, the writ shall have the same force and effect as if a precept of clare constat had been granted, and an instrument of sasine duly expedite and recorded according to the former form.

: 946. When lands are held of the Crown or Prince, a precept from Chancery was issued, containing, like the precept of clare constat, both a recognition of the heir's character and a command to infeft him. For this precept a simple writ of recognition has been substituted, as in the preceding instance.

947. *Entry by Adjudication on a Trust-Bond*, the chief object of which was to enable the heir to challenge deeds adverse to his right, without immediately rendering himself liable as heir—a device of Sir Thomas Hope's—is rendered less valuable than formerly by the Service Amendment Act (*ante*, p. 155; 10 and 11 Vict., c. 47, sec. 25) above referred to, wherein it is provided that general services may hereafter be obtained to a limited effect by annexing a specification. In the entry by adjudication, the heir grants a bond to a confidential person for a sum equal at least to the value of the estate. The holder of the bond charges the heir to enter, and on his refusal adjudges the estate. On the title which he thus acquires he brings a reduction of the adverse deed; and if he is successful in this, he reconveys the bond and the adjudication on it to the heirs. In practice, this form of entry is now unknown.

948. *Entry to Burgage Property*.—This form of entry, which was very peculiar, has now been assimilated to that to lands not held burgage, and is regulated by 23 and 24 Vict., c. 143. Sec. 7 provides that it shall be competent for the heir of any person

who died last, vest and seized in any lands held burgage, to obtain from the magistrates of the burgh within which such lands are situate, a writ of *clare constat*, or, in his option, to apply for and obtain decree of special service by the Sheriff of Chancery, or by the Sheriff of the county within which such burgh is situate, in the same manner in all respects as if such lands were not held burgage; and such writ of *clare constat* or decree of special service may be recorded in the appropriate Register of Sasines, and when so recorded, with warrant of registration thereon, shall have the same effect in all respects as if cognition and entry of such heir had taken place in due form, and an instrument of cognition and sasine, in regard to such lands, and in favour of such heir, had been duly expedite and recorded, according to the present law and practice.

949. *Charges Abolished.*—Charges were commands in the Sovereign's name, issued at the instance of a creditor, whereby the heir was required to take up the succession, and certifying him that, in case of failure, the creditor should have action against the estate in the same manner as if he had done so. These forms are abolished by 10 and 11 Vict., c. 48, sec. 16, and c. 49, sec. 8; and it is provided that, in an action for the ancestor's debt against the unentered heir, the citation on and execution of the summons shall be held to imply and be equivalent to a charge, and shall infer the like certification.

950. By 21 and 22 Vict., c. 76, sec. 27, the period allowed to the heir for deliberation, before such actions can be raised against him, formerly a year, is limited to six months. (*Ante*, p. 136.)

## V.—Of Succession in Moveables.

### 1. Intestate Succession.

951. Moveable follows the same course as heritable succession, except in three points: It admits, 1st, no preference of males;

2*d*, no privilege of primogeniture ; and 3*d*, no distinction between heritage and conquest. (Stair, iii. 4. 24 ; Ersk. iii. 9. 1, *et seq* ; Bell's Prin., secs. 1860 and 1861.)

952. Till recently, there was no representation by the issue of a predeceasing next of kin (*ib.*) ; but this, and several other serious defects in the Scottish law of intestate moveable succession, have been removed by 18 Vict., c. 23 (1855).

953. But the rule which places the issue of a predeceasing next of kin in the parent's place still suffers a limitation. No representation is admitted among collaterals after the descendants of brothers and sisters. (Sec. 1.)

954. The former rule, that, after descendants, collaterals should in every case succeed before ascendants, has been modified in favour of the father and mother of an intestate, thus:—

955. § 3. “ Where any person dying intestate shall predecease his father without leaving issue, his father shall have right to one-half of his moveable estate, in preference to any brothers or sisters, or their descendants, who may have survived such intestate.”

956. § 4. “ Where an intestate, dying without leaving issue, whose father has predeceased him, shall be survived by his mother, she shall have right to one-third of his moveable estate, in preference to his brothers and sisters or their descendants, or other next of kin of such intestate.”

957. The full blood still takes precedence of the half blood ; but as regards brothers and sisters uterine, who were wholly excluded by the former law, the following is now the rule:—

958. § 5. “ Where an intestate, dying without leaving issue, whose father and mother have both predeceased him, shall not leave any brother or sister german or consanguinean, nor any descendant of a brother or sister german or consanguinean, but shall leave brothers and sisters uterine, or a brother or sister uterine, or any descendant of a brother or sister uterine, such

brothers and sisters uterine, and such descendants, in place of their predeceasing parent, shall have right to one-half of his moveable estate."

959. The following sections, as was formerly observed (see Marriage Contracts), have removed what in many cases were the sole reasons for substituting the provisions of a marriage contract for those of the common law:—

960. § 6. "Where a wife shall predecease her husband, the next of kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion; nor shall any legacy, or bequest, or testamentary disposition thereof, by such wife, affect or attach to the said goods or any portion thereof."

961. § VII. "Where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid." It must not be forgotten that this provision relates to moveable property only, the old rule being still in force as to heritage. (See Dissolution of Marriage by Death.)

962. This rule of course does not apply to property made separate in the wife's person by *deed*, the succession to which will be regulated by the clauses of the deed under which it is held as separate.

## 2. *Of Testate Succession in Moveables.*

963. A testament or will (in the law of Scotland the words are synonymous) may be made at any period of life beyond the age of fourteen in males, and twelve in females. The near approach of death, or the severest bodily or even mental suffering will not affect its validity, provided the testator was of sound mind and acquainted with its contents when he signed it.

(Toword, June 5, 1812, H. of L., May 16, 1817, 5 Dow 231; White, Jan. 21, 1814, H. of L., June 20, 1823, 1 Shaw 472; Gillespie, Feb. 11, 1817, F. C.; Watson, Nov. 18, 1825; M'Diarmid, May 17, 1826.)

964. It must be the *last* will of the deceased. The scriptural maxim, that a testament "is of no strength at all while the testator liveth" (Heb. ix. 17), is the rule with us; and a will may consequently be revoked at pleasure. (Ersk. iii. 9. 5.)

965. Where several testaments are left, of different dates, the earlier ones are presumed to be revoked by the last, which alone is effectual. (Douglass, Feb. 25, 1789, M. 15949.)

966. All persons being capable of testing who are capable of consent, minors require no consent from their curators (Ersk. i. 7. 33; Fraser, ii. 208), wives from their husbands (Ersk. i. 6. 28; Fraser, i. 273; Menzies' Lectures, p. 460), nor interdicted persons from their interdictors. (Mansfield v. Stuart, 26th June 1841; Fraser, ii. 345; Menzies, p. 44.)

967. But it is only a person who leaves neither wife nor child who can dispose of the whole of his moveable estate by will, and a testament in favour of strangers becomes ineffectual by the birth of children after it is made (Menzies, 461), the *jus relictæ* of the widow and the legitim of the children being protected by law from its provisions. (See Jus Relictæ and Legitim.)

968. Even previous to death, the moment he is seized with his last sickness, or, as it has been expressed, "begins to die" (Dirlton, *voce* Legitima Liberorum; Ersk. iii. 9. 16; Menzies, 460) (which one would suppose was the moment he was born), the husband or father is precluded from alienating the goods in communion to the prejudice of his wife or children.

969. The share of the goods in communion which falls to the wife as *jus relictæ* becomes her absolute property. No legitim to children is due on it, and she can therefore dispose of the whole

of it by will. The subject of *jus relictæ* has already been treated under the head of the Husband and Wife. (*Ante*, p. 33.)

970. *Legitim*.—In the event of there being a widow, one-third,—and if there be no widow, one-half,—of the whole moveable estate is set apart as *legitim*, or bairn's part; and over this the deceased has no power of testing. (Ersk. iii. 9. 17 and 19.) Considering the peculiar legal character of *legitim* as a fund on which the father cannot test, and the definitions of "intestate" and "moveable estate," given by the interpretation clause of the statute (18 Vict., c. 23), it seems clear that the right of representation, thereby introduced into moveable succession, does not apply to *legitim*. No person can die intestate as regards either *legitim* or *jus relictæ*; and the Act is expressly limited to the whole free moveable estate, on which the deceased might have tested, undisposed of by will.

971. The claims to *legitim* may be excluded in two ways: 1st, By provisions, expressly stated to be in lieu of it, being settled on children to be procreated, by an antenuptial contract of marriage. A clause excluding children from their *legitim*, without making any other provision for them, would be inoperative. Even where the provision is reasonable, the children may reject it, and claim their legal rights; but in that case they could not of course take any other benefit under the contract. 2d, By express renunciation by the child, which is generally, though not necessarily, in consideration of a separate provision. Such renunciations, however, even where a sufficient provision has been made, will be construed in the strictest manner, for the law will not allow a right founded in nature to be barred by implications or presumptions.

972. *Dead's Part*.—The remaining portion of the moveable estate, which alone may be bequeathed by will, is called the dead's part. (Ersk. iii. 9. 18.) It may be increased by express renunciations or discharges of their legal rights by the wife or

children, so as to include the whole estate; or it may be either increased or diminished by the conventional provisions of a marriage contract.<sup>1</sup> (*Ante*, p. 42.)

973. Whatever can be positively ascertained to have been the wishes of the deceased with reference to this portion of his property, will be carried into effect, provided that they are neither inconsistent with public law, immoral, insane, nor impossible. (Stair, iii. 8. 35; Ersk. iii. 9. 5; Bell's Prin., sec. 1862, *et seq.*) The will of a fool being thus valid, and that of a madman invalid, many of the difficulties which arise in judging of the validity of wills are occasioned by the uncertainty of the line which divides folly from madness.

974. By the Act 39 Geo. III., c. 98, called the Thellusson Act, it is made illegal to direct the accumulation of property beyond certain periods,—viz., beyond twenty-one years after the testator's death, or the minority or minorities of persons living at the testator's death. It was provided that the Act should not extend to any disposition respecting heritable property in Scotland, but this limitation was repealed, and the Act so extended, by 11 and 12 Vic., c. 36, sec. 41. The same Act was extended to accumulations of the proceeds of heritable estate by 11 and 12 Vict., c. 36.

975. *Rules for making a Will.*—The two leading objects to be kept in view in constructing a will, are—1st, That it shall be clearly expressed; and, 2d, that it shall be obviously the production of the testator, or at least that it was understood and assented to by him. (*Watson v. Noble's Trustees*, 18th Nov. 1825; *Menzies*, 460.) For the attainment of these objects the following rules have been fixed:—

<sup>1</sup> A distribution of the moveable estate, similar to that which still prevails in Scotland, was followed by the ancient customs of the city of London, and of the province of York, and was probably common to the whole island. These customs were abolished by 19 and 20 Vict., c. 94, sec. 1. (See *Stephen's Comm.*, vol. ii., p. 222.)

976. *Verbal and Written*.—A verbal expression of intention, proved by witnesses, will convey legacies to the extent of L.8, 6s. 8d. (L.100 Scots) each. (Bell's Prin. 1874.) If a larger sum be mentioned by the testator, it will be restricted to this sum; it being requisite, in order that a larger sum be bequeathed, an executor appointed, or any former will or legacy recalled, that the expression of intention be in writing. (Bell's Prin., sec. 1874.)

977. *Holograph*.—Wills written with the granter's own hand, being more difficult of forgery than others, are valid in law without witnesses. (Pennicuick, 1709, M. 16970; Bell's Prin. 1868.) But it is not enough to produce a document all in one handwriting, and bearing to be signed by the testator, or even containing a statement to the effect that it was written and signed by him. The document must be proved to be holograph of the deceased, by showing either that the body of the deed or the signature is his. (Lord Chancellor (Chelmsford), in *Anderson v. Gill*, April 13, 1858.)

978. *Testing*. If not written by the granter's hand, the will must be signed by him, if he is able to write, before two witnesses, who must be males above fourteen years of age. (1584, c. 133; Bell's Prin., sec. 1868; Menzies, 461.)

979. Blind persons, who cannot see the party write, insane persons, and persons who have a material interest in the deed, cannot be instrumentary witnesses. (Menzies, 109, *et seq.*) Those who have merely received trifling legacies as marks of regard are not thereby incapacitated from acting as witnesses, though in practice they had better be avoided. (*Ibid.*)

980. If the testator acknowledges his signature to the witnesses, the effect will be the same as if they had seen him write. (Menzies, 113.) The names and designations of the witnesses and of the writer must be mentioned in the body of the deed. (*Rankine v. Reid*, 7th Feb. 1849; Menzies, secs. 80, 117, and 136.)



981. It will be no objection to a will that the testator was blind when he signed it. (Menzies, 105.)

982. If the testator's hand has been led, or letters traced on the paper for him to follow, the signature will not be held to be his, and the deed will be reduced. (Ibid., p. 102.)

983. Every page must be signed; and marginal notes must be signed by writing the Christian name or names above the note or before it, and the surname after or under it. (Ibid. 103.)

984. Subscription by initials, though not invalid, requires to be proved to be the ordinary practice of the writer, and had better be avoided. Subscription by a mark is invalid. (Ibid. 103-104.)

985. The deed must either be read by the granter, or read over to him in such a way as to acquaint him with its contents, before signing. The fact of its not having been read or understood, however, will fall to be proved by the party who alleges it. (Ibid. 105 and 460.)

986. When the testator cannot write, a testament will be valid, let the subject be ever so valuable, if it be signed either by a notary or by the Established clergyman of the parish (Menzies, p. 137), and two witnesses. In the execution of all other deeds two notaries are required, and it is in wills alone that the place of a notary can be supplied by a clergyman. (On the subject of notarial subscription generally, see Menzies, p. 105, *et seq.*)

987. *An Executor*, or person to execute the will of the deceased, and to administer the moveable estate for the benefit of all concerned, is a usual provision, though not an indispensable requisite in a will. From him the moveable estate is frequently called the *executry* of the deceased.

988. The executor is commonly instructed to pay the donations or legacies to the parties for whom they are destined, though it is quite competent to convey them directly, and without his intervention. (Menzies, p. 464.) The executor, as such, has

now no interest in the succession; the Intestate Moveable Succession Act (18 Vict., c. 23, sec. 8) having repealed so much of the Act 1617, c. 14, "as allows executors nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased," and enacted that "executors nominate, as such, have no right to any part of said estate."

989. A legacy is valid though there should be an error in the name of the legatee, provided there be no doubt as to the person (*Keiller or Wedderspoon v. Thomson's Trustees*, 15th Dec. 1824; *Menzies*, 471); and, in general, no clerical, orthographical, or other error, vitiates a provision in a will, provided the meaning of the testator be discoverable. (*Grant v. Grant*, 1st March 1851.)

990. If the legatee predeceases the testator, the legacy, never having become due, is not transmitted to the representatives of the former, but continues part of the testator's general executry. (*Rutherfords v. Turnbull*, 30th May 1821.) It is otherwise, of course, if the legacy be devised to the legatee and his *executors*. (*Harvey v. Grant*, 19th Feb. 1824; *Menzies*, 477.)

991. Legacies are universal, general, and special.

992. A *Universal Legacy* is a bequest of the whole moveable estate, or of the residue of it after the other legacies and burdens are liquidated; and the person who receives it is called the universal or residuary legatee, and becomes the representative of the deceased in his moveable estate. (*Menzies*, 472; *Ersk.* iii. 9. 11; *Bell's Prin.* 1872.)

993. A *General Legacy* is a legacy of a thing not otherwise described than by its quantity or value, as L.50 of money, without mentioning any particular source from which the L.50 is to be derived. The legatee in this case has a claim only for the amount or value; and if the residue, after paying the specific claims, is insufficient, the general legacy will be diminished accordingly. (*Ibid.* 473; *Ersk. ibid.*; *Bell's Prin.* 1873.)

994. *A Special Legacy* is where the specific object is mentioned. In this case the legatee considers it at once as his own, and he can claim it from the executor so long as it exists; but if it perish, he has no claim for its value against the estate. (Ersk., *ut supra*; Bell's Prin. 1874.)

995. Special legacies thus rank first after the debts of the deceased, then general legacies, and lastly, the residuary or universal legacy.

996. *Conditional Legacy*.—A legacy may be burdened with a condition. If the condition be impossible or illegal, it is held *pro non scripto*, and the legacy is unconditional. (Ibid. 474; Bell's Prin. 1881.)

997. *Substitutions*.—Much difficulty is often occasioned by the substitution of one person for another, and the tendency of the courts is against supporting substitutions in moveable estate. In the case of the first legatee predeceasing the testator, if the bequest was to his heirs, executors, and assignees, it goes to his proper representative, and not to him to whom he may have assigned it during the testator's life, because it never came into his possession, and he never had the power of assigning it. (Henry, Feb. 19, 1824; Menzies, 480; Bell's Prin. 1878.)

998. If a bequest be to one and his assignees, without mention of heirs or executors, it does not vest at all, and neither his heirs nor assignees have any claim unless he survive the testator. (Graham, Feb. 17, 1807.)

999. A legacy to two jointly, or jointly and severally, goes to the survivor, to the exclusion of the heirs or assignees of the other. (Bell's Prin., sec. 1879.)

1000. A legacy to two equally is equally divided—the heirs or assignees of each taking a half, provided both legatees have survived. If one of the legatees predeceases the testator, the other only takes half the legacy. (Paterson, June 4, 1741; Bell's Prin. 1879.)

1001. *Form of Will.*—We formerly mentioned that any form of words which conveys the meaning of the testator unequivocally, is admissible in a will; and it may be added, that the safety of the non-professional conveyancer will generally consist in a studious *avoidance* of technical terms.

The following form is given, simply with the view of suggesting the requisites of a Will, in something approaching to a tabular form. It may be written on common paper; no stamp duty being now chargeable on any will, or other testamentary instrument. (23 Vict., c. 15, sec. 7.)

I, A., do hereby appoint B., whom failing, C., to be my sole executor and universal legatory, bequeathing to the said B., whom failing, to the said C., the whole moveable estate that may pertain or be resting owing to me at the time of my death, under such burdens as may attach to it by law; and I ordain my said executor to pay and deliver the following legacies to the persons after named and designed (here specify the legacies and design the legatees). In witness whereof I have subscribed this deed, written (if the deed consists of two or more pages, say on this and the preceding page or pages, specifying the number) by (here insert the name and designation of the writer of the will at full length), at (insert the name of the place where the will is signed), the                      day of                      one thousand, etc., before these witnesses, M. and N. (here the full names and designations of the witnesses must be inserted either by the writer of the deed or by another who must be named).                      (Signed)                      A.

M., *Witness.*

N., *Witness.*

The following is the form of legacy appended to the notices of collections for the Education Scheme, by appointment of the General Assembly of the Church of Scotland:—

“I give and bequeath the sum of                      to the Committee of the General Assembly, for promoting education and religious

instruction throughout Scotland, but particularly in the Highlands and Islands; and the receipt of the Convener or Secretary of the Committee for the time being, shall be a sufficient discharge."

(Forms of Wills, Dispositions, Trust Dispositions and Settlements, Legacies, and the like, will be found in Bell's Law Dic., *voce* Will.)

1002. *Collation*.—Where the estate of the deceased is partly heritable and partly moveable, the heir in heritage has no share in the moveable estate if there be others as near in degree as himself. But as the heir in heritage, where the heritable estate is limited, might be unjustly affected by this arrangement, he is permitted to *collate* the heritage, *i.e.*, to throw it or its value (*Fisher v. Fisher*, Dec. 5, 1850) into the common stock, and betake himself to his rights as one of the next of kin.

1003. This privilege is extended by the late Act (18 Vict., c. 23, sec. 2) to the child of the heir, being heir in heritage of the intestate, "to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there be such other issue, the share of the moveable estate of the intestate, which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser, being heirs portions of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage, of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation."

1004. Even where the heritage is situated in another country, the heir must collate if he wishes to share in the moveable suc-

cession. (Robertson, Feb. 16, 1816; Robertson, Feb. 18, 1817; Trotter, Dec. 5, 1826.)

1005. *Confirmation*.—To entitle the executor (who, in the case of intestacy, by the late Act (18 Vict., c. 23, sec. 1), is the surviving next of kin of the deceased, if he shall claim the office, in preference to the children or other descendants of any predeceasing next of kin) to sue for the debts due to the deceased, and otherwise to take possession of his property for the purpose of administering it for the benefit of those having interest, it is necessary that his character as representative should be recognised by the decree of a magistrate. This decree is pronounced, by the Sheriff of the county, in his capacity of Commissary, where the deceased was domiciled, or, if he was domiciled abroad, or his domicile unknown, by the Sheriff of Edinburgh acting as Commissary, and is called *confirmation*. (21 and 22 Vict., c. 56, sec. 3.) The confirmation may include personal estate situated in England or Ireland, or both (*ibid.*, sec. 9); and on its being produced in the principal Court of Probate in England or Ireland, or both, and a copy thereof deposited with the Registrar, along with a certified copy of the interlocutor of the Commissary, finding that the deceased died domiciled in Scotland, such confirmation shall be sealed with the seal of said Court, and shall have the like effect in England or Ireland, as if a probate or letters of administration had been granted by said Court of Probate. (*Ibid.*, secs. 12 and 13.)

1006. If an executor be named in the testament, he is entitled to be confirmed in preference to all other claimants, on production of that document, and of a full inventory of the moveable estate. This is called confirmation of a testament-testamentar. (Bell's Prin., sec. 1893; *Graham v. Bannerman*, 28th Feb. 1822, Menzies 467.)

1007. If no executor be named, the order of choice observed by the Commissary is the following:—

1008. *1st*, The universal legatee, including trustees; *2d*, the next of kin; *3d*, the children or descendants of any predeceasing next of kin (18 Vict., c. 23, sec. 1); *4th*, the widow; *5th*, a creditor, to the extent of any debt which has been constituted either by a writing by the deceased, or by the decree of a court; *6th*, a legatee; and *7th* (though the practice be obsolete), the Procurator-Fiscal of the Court.

1009. All executors not nominated in the will must find security to the satisfaction of the Court. (Menzies, 467.) The inventory is given on oath, and such portions of the estate as are afterwards discovered must be "eiked," or added to it.

1010. The executor creditor makes oath to the amount of his debt, which must be constituted (Menzies, 470), and he must likewise give notice in the *Gazette*. (Menzies, 469.)

1011. Persons succeeding to certain small sums, payable by savings' banks and friendly societies, are exempted from the necessity of confirming. (13 and 14 Vict., c. 115, sec. 40, and 7 and 8 Vict., c. 83, sec. 10.)

1012. *Order of Payment of Debts.*—There are certain privileged debts, that is to say, debts which the executor is bound to pay before attending to other claims on the estate of the deceased. *1st*, The expenses of a funeral suited to his station and presumed fortune. *2d*, All medical and other expenses connected with his last illness. *3d*, The current rent of the house in which he died. *4th*, His farm and domestic servants' wages for the period current at his death. *5th*, Certain debts which are privileged by statute; *e.g.*, the payment by ministers to their widows' fund, and the claims which friendly societies and savings' banks may have against their office-bearers. (Ersk. iii. 9. 43; Bell's Prin. 1406.)

1013. The period of six months after the death of the deceased must be allowed for ordinary creditors to come forward, and they are then ranked according to the order to be explained below. (*Vide Bankruptcy.*)

1014. By the 8th sec. of the Intestacy Act (18 Vict., c. 23), so much of the Act of 1617 as allows executors nominate to retain to their own use a third of the dead's part in accounting for the moveable estate of the deceased, is repealed, and executors have now no right to any part of the succession. The Act of 1617 was never enforced; and now, unless remunerated by a special legacy, the services of executors are legally, as they have always been practically, gratuitous.

*Taxes Payable on Succession.*

1015. 1st, A stamp duty is payable on the inventory of the moveable estate, of about 2 per cent. of the amount or value; a scale of which will be found in the Stamp Act, 55 Geo. III., c. 184. By 21 and 22 Vict., c. 56, sec. 9, the inventory may include personal estate in England and Ireland. 23 Vict., c. 15, sec. 4, provides that the stamp duties payable by law upon inventories in Scotland, shall be levied in respect of all personal or moveable estate and effects which any person hereafter dying shall have disposed of by will, under any authority enabling such person to dispose of the same, as he or she shall think fit. If the property has been valued too high, a new inventory may be lodged, when the stamp duty paid on the first will be returned.

1016. 2d, A duty is payable on the net value of the whole moveable estate as set forth in the inventory, and on all interest and dividends which may have accrued down to the time of paying the duty, after deducting all debts and expenses.

1017. The duty varies from 1 to 10 per cent., according to the degree of relationship of the legatees to the deceased. Where the legatee is a lineal descendant or ancestor, it is 1 per cent.; where he is a stranger, it is 10 per cent. The duty is payable on each legacy of L.20 and upwards; where the estate is under L.20, there is no duty payable.

1018. No stamp duty is now (1860) chargeable on any will,



testament, testamentary instrument, or disposition *mortis causa*, in Scotland. (23 Vict., c. 15, sec. 7.)

1019. By the recent Act, "to amend the law with respect to wills of personal estate made by British subjects (24 and 25 Vict., c. 114), it is provided that wills of personal estate made by British subjects abroad, shall be held good, if made according to the forms of the law of the place where made, or of the law of the domicile, or of the domicile of origin ; that wills made within the United Kingdom, shall be good if made according to the law of the place where they are made, and that a subsequent change of domicile subsequently made shall not invalidate a will. It is declared that the Act shall not invalidate any will that would have been otherwise valid, and that it shall only affect the wills of persons dying after its passing." (6th Aug. 1861.)

1020. When a Scotchman dies abroad, the first point to be ascertained is, whether his foreign residence was temporary or permanent. If the former was the case, his moveable succession descends to his next of kin according to the law of Scotland ; if not, it follows the law of the country in which he had established himself, and the laws of which he is presumed to have adopted. The same rule applies *mutatis mutandis* to a foreigner dying in Scotland. (Ersk. iii. 9. 4.)

1021. As regards heritage, on the other hand, "it is," says Mr Erskine (iii. 8. 10), "an universal rule in every country, that the succession to land, estates, and all heritable subjects, must be governed by the law of the kingdom or state where they are situated, and not according to the *lex domicilii* of the proprietor, though he should happen to die abroad, and have his settled residence there at his death."

1022. These provisions of the common law are somewhat modified by the statute of 1861 (24 and 25 Vict., c. 121), which provides, that where a convention has been entered into with a foreign state, the Queen, by order in Council, may direct that

no British subject resident in that state shall be deemed to have acquired a domicile there, unless he shall have been resident there a year before his death, and have deposited in a public office a written declaration of his intention to become domiciled there. The same provision is made, *vice versa*, with reference to foreigners dying in Great Britain, who have not resided there a year, and lodged a corresponding declaration in the Home Office. The Act does not apply to foreigners who have obtained letters of naturalization. Where there is such a convention, the Queen, by order in Council, may direct that, where foreigners die in this country without executors, their consul shall be appointed executor, recover their property, pay their debts, and hold the remainder for behoof of the parties entitled to receive it. All such orders in Council are to be published in the *London Gazette*.

## CHAPTER VII.

### OF TRUSTS AND TRUSTEES.

1023. *Of Trusts in General.*—The forms of trusts and trust-deeds are as various as the objects which they have in view, and the provisions which they make for the attainment of these objects. The following features, however, are common to them all.

1024. (1.) They create a legal estate in the person of the trustee, for the accomplishment of certain objects prescribed by the truster. (Ersk. iii. 1. 32.)

1025. (2.) The purposes of the trust are limitations of the truster's right of property, and burdens on the estate preferable to all claims against it which he may create. (Bell's Prin. 1991; Bell's Com., p. 34.)

1026. (3.) The uses and purposes of the trust may be effec-

tually declared either in the original deed by which it is constituted, or by a supplementary deed,—power so to declare them in future having been reserved in the first deed. (Bell's Prin. 1991; Menzies, p. 674.)

1027. (4.) In so far as not exhausted by the uses and purposes of the trust, the estate remains the property of the truster, as if no trust had been constituted; and the trustee is bound to reconvey it to him or his representatives. (Bell's Prin. 1991.)

1028. *Of the Trustees.*—No specific number of trustees is requisite to constitute a trust; and the number consequently varies according to the object of their appointment. (Bell's Prin. 1993.)

1029. Where the object is to wind up as speedily as possible a bankrupt or insolvent estate, one trustee has generally been found most convenient; and, under the Bankrupt Act, there can be but one trustee in a sequestration. (Bell's Prin. 1993–1.)

1030. Where the object is to substitute, during a length of time, the management of others for that of the actual possessors of the estate, as in all family settlements, whether by marriage-contracts, or by trust-deeds executed in the prospect of death, several trustees are usually named. (Bell's Prin. 1993–2.)

1031. If several trustees are named jointly, the presumption is, that the truster reposed confidence in them only so long as they acted together; and consequently, if one dies or declines, the nomination falls. (Bell's Prin. 1993; Hepburn, July 13, 1699, M. 7428.)

1032. If a certain number be named as a *quorum*, the trust falls unless that number accept, and their concurrence is requisite to every act. (Ibid., Menzies 671; Halley v. Gowans, 20th Feb. 1840, 2 D. 623.)

1033. If one is named *sine quo non*, his concurrence is indispensable to every act, and his death puts an end to the trust.

(Ibid., Menzies 671; Vere v. Earl of Hyndford, 1st June 1791; Bell's 8vo Cases, 554.)

1034. To avoid the inconvenience which might arise from these rules, the common practice is to declare that the acceptors or survivors of those who are named shall be the trustees; and in this case the trust subsists so long as any of those who have accepted survive. (Ibid., Menzies 672; Gordon's Trustees v. Eglinton, 17th July 1851, 13 D. 1381; Finellay, 30th June 1855, 17 D. 1014; Seton v. Seton, 28th Nov. 1855, 18 D. 117.)

1035. Where, from any unforeseen cause, the nomination is defeated, the Court will not authorize a diminished number to act, but will appoint a factor to carry out the provisions of the trust. Ibid.; see Menzies, p. 688, and cases cited.)

1036. No one can be compelled to accept, to act, or to incur the responsibilities of a trustee; but after acceptance he cannot decline to act, and will be liable for the consequences of doing so until he resign or be discharged. Acceptance must be either express or implied by the acts of the trustee himself. But, once accepted, the office could not till recently be thrown up at the will of the trustee; nor will his resignation of it, even now where that may be competent, be presumed without the most express declaration of his intention. (Stair (More's Notes, lxxvi.); Menzies, p. 688; Carstairs, 20th Jan. 1766, 2 Hailes 678; Logan v. Meiklejohn, 26th May 1843, 5 D. 1066; Gordon, 2d June 1854, 16 D. 884.)

1037. If no power of voluntary resignation be contained in the deed, or if it does not fall under the category of deeds to which the provisions of 24 and 25 Vict., c. 84, apply, the Court of Session will exonerate and discharge the trustee, only where it is proved to them that his duties have been fully discharged, that it has become impossible for him in fact, or incompetent for him in law, to discharge them; or where bad health, necessary and permanent absence, or some other very sufficient reason for

resignation, is established ; but not where the trust has merely become inconvenient or disagreeable. If, from an unforeseen change of circumstances, the trustee shall come to be in a position wholly different from that which he reasonably anticipated when he accepted the office, or in which the truster intended he should be placed, he would be entitled to claim exoneration, on the ground that the trust is no longer that which he undertook. But a very strong case of this description used to be considered necessary, in order to warrant an application to the Court with any prospect of success. (Gilmour, 14 D. 454 ; Hill v. Mitchell, Dec. 9, 1846, 9 D. 239 ; Pridie, 9th June 1855, 17 D. 835.)

1038. Where the purposes of the trust are completed, and all the parties interested agree to its being wound up and the trustee exonerated, this may be done by a regular written discharge, which the trustee must be careful to have signed by all who are interested in the trust. If a minority of the beneficiaries, however insignificant, should refuse their concurrence, an application to the Court will be necessary. When the purposes of the trust are accomplished, the trustees may be compelled to denude by an action of declarator of trust and adjudication. (Menzies, 689 ; Bell's Prin. 2001 ; Dalziel v. Henderson, 11th March 1756, M. 16204 ; Drummond v. Mackenzie, 30th June 1758, M. 16206.)

1039. Where the trustees are empowered to assume others into the trust, or to devolve it on them, this power may be exercised even on deathbed. (Menzies, 682 ; Roughhead, March 5, 1833, 11 S. 516. See 24 and 25 Vict., c. 84, *infra*.)

1040. If the purposes of the trust are expressed in intelligible language, either in the trust-deed or in a separate deed, the powers of the trustees will be in accordance with these purposes ; and whatever is essential to the accomplishment of the purposes of the trust will be implied as a power in the trustees. Trustees will thus be justified in selling land for the payment of debt, and



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too often also a thankless office, trust-deeds generally contain, as an inducement to accept, a clause freeing the trustees from liability for omissions, and limiting their responsibility to their own actual intromissions. But difficulties not unfrequently arise as to the distinction between intromissions and omissions; and it may be stated as a general rule, that where negligence possesses the positively culpable character which the law has attempted to define as *culpa lata*, the exempting clause will not protect the trustee. (Menzies, 684, and cases cited; Bell's Prin. 2000.)

1048. *Power to resign.*—With the same object it is now usual to insert in family trust-deeds a clause empowering the trustees to resign, and the validity of such a clause has been sustained by the Court. (Gilmour v. Gilmour's Trustees, Feb. 7, 1852.)

1049. With reference to trusts constituted and liabilities incurred subsequent to 6th August 1861, the stat. 24 and 25 Vict., c. 84, provides that “all trusts constituted by virtue of any deed or local Act of Parliament, under which gratuitous trustees are nominated, shall be held to include the following provisions, unless the contrary be expressed,—that is to say, power to any trustee so nominated to resign the office of trustee; power to such trustee, if there be only one, or to the trustees so nominated, or a quorum of them, to assume new trustees, a provision that a majority of the trustees accepting and surviving shall be a quorum, and a provision that each such trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions.” (Sec. 2.) The Act does not extend to trustees appointed under the contracts of trading companies. (Sec. 3.)

## BOOK II.

### OF THE RELATIONS BETWEEN INDEPENDENT MEMBERS OF THE COMMUNITY.

1050. THE subject of trusts and trustees, belonging partly to the arrangements of the family, and partly to those between persons connected by no other ties than those of a common country, forms, as it were, a connecting link between what may be regarded as the two great natural divisions of Private Law. In passing from the contract of marriage, and its consequences in the domestic relations and the law of succession, to such contracts as sale, letting and hiring, insurance, partnership, agency, and the like, we finally quit the family and its laws, and enter upon the arrangements by which intercourse is carried on between independent members of civilised communities.

1051. To the whole of this vast department, when regarded as exclusive of the relations of the citizen to the governing power, and using the words in a very comprehensive sense, the name of Mercantile Law may not inappropriately be given.

1052. From the extensive connection which they enjoyed with the Continent, the lawyers and merchants of Scotland became early acquainted with those commercial arrangements which the Lombards, and other trading communities of Italy and Spain, in the south, and the members of the Hanseatic League (Innes's *Scotland in the Middle Ages*, pp. 151, 152, 164, and 170) in the north, of Europe, had based on the principles which the Roman



jurisprudence had borrowed from the maritime system of the Rhodians and other trading nations of antiquity. To this cause, is to be ascribed the fact that the usages of trade were extensively known, and that down to the period when the affairs of Scotland were thrown into confusion by the Rebellions of 1715 and 1745, mercantile law was cultivated in Scotland with much care and success. The learning of the feudal lawyers was called into prominent activity by the questions connected with the relations of superiors and vassals to which the numerous forfeitures which followed the Rebellions gave rise; and it was not till the commencement of the present century that the mercantile law of moveables came again to be a leading object of study with Scottish lawyers. (On this interesting subject the reader is referred to the Introduction to the valuable Commentaries of the late Professor Bell, himself the leading authority on the Mercantile Law of Scotland.) The impulse which led to its revival was derived, not from the Continent, but from England, and from the vast increase in mercantile transactions, to which the Union with England gave rise; but it must ever be a source of honest pride to reflect that this impulse originated with our own countrymen. Lord Mansfield, who has been called the father of the commercial law of England, was a Scotchman; and two of the most illustrious of his disciples, in different branches of the same department, bore a name which places their Scottish origin beyond question.

## CHAPTER I.

### OF THE CONSTITUTION OF CONTRACTS IN GENERAL.

1053. In treating of marriage, which in the eye of the law is simply a civil contract, and of the guardianship of those who are

incapable of contracting, we had occasion to explain the nature of *consent*, which is the essence of all contracts. The subject will receive further illustration from the other contracts of which we are about to speak, and it will, therefore, be sufficient if we here recur to it very briefly.

1054. The consent which constitutes a legal obligation must be deliberate and voluntary. By requiring that it shall be deliberate, the law deprives all persons who are imbecile, whether from nonage, mental disease, or mental decay, of the power of entering into contracts; and by declaring that consent shall be voluntary, it deprives of the character of legal obligations all engagements which have been entered into from *error*, *force*, *fear*, or *fraud*. (Stair, i. 10. 13; Ersk. iii. 1. 16; Bell's Prin. 10; 1 Bell's Com., 5th ed., p. 294.)

1055. *Error* must be in essentials; that is to say, it must be of such a kind as may reasonably be presumed to have affected the consent. (Stair, *ut. sup.*, and i. 9. 9; Ersk., *ut. sup.*; Bell's Prin. 11; 1 Bell's Com. 294; Menzies, p. 65.)

1056. *Force* and *Fear* must be such as to overpower a mind of ordinary strength and firmness. A smaller amount of violence or intimidation will annul the engagement of a woman, a child, or a man in old age or in sickness, than of a man in health and vigour. (Stair, i. 9. 8; Ersk. iii. 1. 16, and iv. 1. 26; Bell's Prin. 12; 1 Bell's Com. 295; Menzies, p. 68.)

1057. *Fraud*.—A stratagem sufficient to deceive a person of ordinary capacity, and which has actually led to the engagement, will ground an action for reducing it. If, on the other hand, the fraud was only an accompaniment of a contract in which the parties would otherwise have engaged, it will, in certain cases, give rise only to an action of damages. Fraud may be perpetrated by false representation, by concealment, by underhand dealing, or by inducing imbecility by means of intoxication or otherwise. (Stair, i. 9. 9, 15; Ersk. iii. 1. 16, and iv. 1. 27;

1 Bell's Com. 297 and 240, *et seq.*; Bell's Prin. 13 and 14; Menzies, p. 67.)

1058. The nullity which is created by the want of consent, in obligations entered into from error, force, or fraud, must be ascertained judicially; all contracts ostensibly valid subsisting till they are reduced by an action at law. (Ersk. iii., 1. 16; Bell's Prin. 11. 12. 13, and note.)

1059. *Written Contracts*, strictly speaking, are such as are effectual only when written; that is to say, in which writing is required not only in proof, but in solemnity. Of this description are all obligations relative to the transference of land and ships. (Stair, i. 10. 11, also sec. 9; Ersk. iii. 2. 1, 2; Bell's Prin. 18; 1 Bell's Com. 322.)

1060. The mode of attesting writings, whether written by another or by the granter, has been already explained, in treating of Wills. The same rules apply to written obligations of every description, whether unilateral or binding on more parties than one. The law takes no cognisance of mere purposes to engage. "The only act of the will," says Lord Stair, "which is efficacious, is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform." (Stair, i. 10. 2.)

1061. *Locus Penitentiae*.—The opportunity which is consequently afforded to the party binding himself, of resiling from an incomplete engagement, an unaccepted offer, or an obligation requiring writing, but to which writing has not yet been adhibited, is called *locus penitentiae*. As an instance of *locus penitentiae*, may be mentioned the power which belongs to either party of declining to contract a marriage after having signed a marriage-contract. In this, as in many similar instances, though the incomplete obligation cannot be enforced, it will give rise to an action of damages. (Stair, i. 10. 9; Ersk. iii. 2. 3, 4; Bell's Prin. 25; 1 Bell's Com. 327.)

1062. *Locus penitentiæ* may be excluded by the course of acting of the party pleading it, subsequent to the engagement. (Ersk., *supra*.)

1063. *Rei Interventus* is an act on the part of the obligee, or person in whose favour the obligation is made, permitted by the obligor, or person obliging himself, on the faith of the agreement, whereby an alteration has taken place in the circumstances of the parties. (Ersk. iii. 2. 3; 1 Bell's Com. 328; Bell's Prin. 26; Menzies, p. 171.)

1064. *Homologation* is an act of the party obliging himself, or his representative, whereby an engagement, in itself defective or informal, is dealt with as binding. Homologation implies not only assent to the engagement, but full knowledge of its extent and consequences. (Stair, i. 10. 11; Ersk. iii. 3. 47, 48; Prin. iii. 3. 15; Bell's Prin. 27; 1 Bell's Com. 145; Menzies, 176.)

1065. *Immoral Contracts*, and such as are *inconsistent with public policy*, are void. Under these heads fall bonds imposing restraint on marriage: *e.g.*, not to marry at all, or to marry a particular person named in the bond, or to be named by a third party; agreements for perpetual service; contracts for defeating the revenue laws, or inconsistent with the war policy of the country. But after smuggled goods are in circulation, the *bona fide* purchaser will be allowed action for their delivery. (Ersk. i. 59. 60; Ersk. iii. 3. 3; Bell's Prin. 36, 43; 1 Bell's Com. 298, *et seq.*; Menzies, p. 47.)

1066. *Gaming Debts and Wagers* cannot be enforced. This rule, as regards the former, is supported by the Gambling Acts, 9 Anne, c. 14, and 1621, c. 14, and is extended to the latter by the common law of Scotland; in accordance with which it has been held, "that courts were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard to *sponsiones ludicræ*." The exclusion of such contracts by the common law of England is a view of the matter which

several of the most distinguished of the English judges have regretted that it is "almost too late to adopt." But questions of law, which it will be competent for the courts to decide, may arise out of sporting transactions,—*e. g.*, where, at a coursing meeting, the stewards, as judges of the running, determined in favour of a certain dog, it was held competent for the Court to decide which of two parties had that interest in the winning dog which entitled him to the prize. (Bell's Prin. 36. 4; 1 Bell's Com. 299; Menzies, p. 49; *Graham v. Pollock*, Feb. 5, 1848.)

1067. *Contracts made on Sunday* are good in Scotland. (Bell's Prin. 44; Menzies, p. 63; Oliphant, 1662, M. 1500; see Phillips, 20th Feb., 1837, 2 S. and M'L. App. Ca. 465.)

1068. *Tippling Act*.—By 24 Geo. II., c. 40, sec. 12, it is enacted that "no person shall recover any sum of money, debt, or demand, on account of spirituous liquors, unless it shall have been *bona fide* contracted at one time to the amount of 20s. or upwards; nor shall any particular article in any account for distilled spirituous liquors be allowed, where the liquors delivered at one time shall not amount to the full value of 20s. at the least."

1069. This Act has been held to apply to wholesale as well as retail dealers, and although the spirits be not consumed on the premises. It extends to spirits mixed with water, but not to wines. (*Alexander and Co.*, March 10, 1824, 2 S. 788; *Johnston*, July 15, 1843, 5 D. 1372; *Maitland*, Nov. 14, 1848, 11 D. 71; Sep. Cas. xi. 71. In this case, it was the opinion of a majority of the whole judges, that this enactment renders such furnishings positively illegal, and does not merely cut off the right of action.

## CHAPTER II.

## OF THE CONTRACT OF SALE.

1070. Sale is a contract whereby one of the parties becomes bound to transfer the property of an object to another for a specified price in current money, which that other becomes bound to pay for it. (Stair, i. 14. 1; Ersk. iii. 3. 2. 13; Bell's Prin. 85; 1 Bell's Com. 434.)

1071. If the price is to be paid in foreign coin, it must be in coin on which some determinate value has been set by the usages of exchange; otherwise the contract will be one of barter, not of sale. (Stair, *ut sup.*; Ersk. iii. 3. 4.)

1072. There must be a price, and a price not altogether illusory, for that would be donation, and not sale (Ersk. iii. 3. 4; Bell's Prin. 92; 1 Bell's Com. 437); but it is not necessary that the price should be adequate, though the fact of its being flagrantly the reverse would be an important adminicle of evidence in support of a plea of fraud. (Fairy, June 23, 1669, M. 14231; Sword, 1771, M. 14241; Wilson, June 14, 1859, 21 D. 957.)

1073. The contingent right to things not yet in existence may be sold, as the hope of a succession, the goodwill of a business or trade, the draught of a net, etc.; but not things the importation or use of which is absolutely forbidden. (Ersk. iii. 3. 3.) The prohibition in such cases, however, must be express, as of diseased meat or unwholesome provisions, by the police Acts.

1074. The intervention of writing is not necessary to the sale of merchandise or moveables in general; but it is the only evidence that will be admitted to prove the sale,—1<sup>st</sup>, of land (Stair, i. 10. 11, also 9; Ersk. iii. 2. 1, 2; Bell's Prin. 18); 2<sup>d</sup>, of ships (Bell's Prin. 1330 and 1457; 1 Bell's Com. 160); 3<sup>d</sup>,

of copyright (Bell's Prin. 1360 and 1457); 4th, of bonded goods in the importer's warehouse (Bell's Prin. 1306 and 1457; 1 Bell's Com. 190).

I.—*Sale of Moveables.*

1075. 1. *Delivery.*—The contract of sale, like all other contracts, is perfected by consent alone; and delivery on the one hand, and payment on the other, may, therefore, be legally enforced. Still, the property of the object sold was not considered by the law of Scotland to have passed to the buyer by the completion of the agreement, and, till delivery, it continued to be attachable by the creditors of the seller. This doctrine has been much qualified by the Mercantile Law Amendment Act (19 and 20 Vict., c. 60), which enacts (sec. 1), that, “where goods have been sold, but the same have not yet been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by, or transferable to, the creditors of the purchaser.”

1076. Notwithstanding the adoption of this rule, the important subjects of the transference of property and risk in sale cannot be said to be yet placed on a satisfactory or permanent footing. (See the elaborate judgment of the Lord Justice-Clerk, in *Hansen v. Craig*, Feb. 4, 1859, and a very sensible article on the subject in the *Journal of Jurisprudence* for May 1859.) The principle towards which legislation seems to be tending is, that transference both of property and risk shall be held to have been effected in every case by the simple completion of the agreement,

irrespective of delivery altogether; and that the agreement shall be held to be complete, and to possess the full characteristics of a contract, if, 1st, the price be fixed or discoverable; and, 2d, if the object itself be in existence, or its quantity and quality ascertained or ascertainable. When this principle is fixed, questions of transference will become questions not of law, but of fact. But this principle has not as yet received full judicial recognition, and it is safer in the meantime to hold that the enactment has made no change in our previous law of sale beyond its express terms. In the case of Hansen, referred to above, though subsequent by more than two years to the date of the statute, the Lord Justice-Clerk (Inglis) observed—"By the Roman law and ours, no property can pass to the buyer without delivery, actual or constructive."

1077. At present, the following seem to be the rules most generally recognised by the Court:—

1078. (1.) If a specific object, already possessing a separate existence, and of known quantity, be sold for a specific price, the right to that thing has been conferred on the buyer, and it henceforth lies for delivery with the seller at the buyer's risk. (Stair, i. 14. 7; Ersk. iii. 3. 7; Bell's Prin. 87; Bell's Com. 437.)

1079. (2.) If, on the contrary, a certain number or quantity, described by weight or measure, be sold for a specified price, either without reference to any particular stock of which it forms part, or with reference to a particular stock from which it has not yet been separated, no specific right has been conferred, and the risk remains with the seller. (Stair, i. 14. 7; Ersk. iii. 3. 7; Brown on Sale, 44; Bell's Prin. 91 (2); Bell's Com. 437.)

1080. (3.) The same is the case, though the object be specific, if its quantity be unascertained; *e.g.*, if a cask of wine, of unascertained quantity, be sold at so much a gallon or so much a quarter, the corpus of the subject is not so specific or the price.



so fixed as to complete the contract or transfer the risk. (Bell's Prin., *ibid.*) The ground on which the case of *Hansen v. Craig* (*ut supra*) was held to be an exception to this rule was, that "within the contract itself there was a statement of particulars which enable any man, without going beyond the contract, by a simple arithmetical process, to ascertain the cumulo price for himself."

1081. (4.) As regards the price, Mr Bell seems to have stated the received doctrine when he says, "The price must be certain, or referred to such standard or criterion as to fix it beyond question, as to the sheriff-fiars fixing the price of grain, or the award of a third party, or even of one of the parties, subject to the control of equity, or the market or current price at a particular time or place." (Prin. 92.) Sometimes such a standard will be pronounced,—as, for example, where goods have been sold and consumed, and a dispute arises as to the price, if evidence be wanting, the Court will fix it at the market value. (Bell's Prin. 92.)

1082. (5.) But the seller's risk is continued, even as regards a specific object, if he has either committed a fault in delaying to deliver (Stair, i. 14. 7; Ersk. iii. 3. 7; Bell's Prin. 88 and 117), or if, by undertaking to deliver at a certain place, he has come under an implied obligation to bear the risk till delivery (Spence, Jan. 25, 1687, M. 3153; Miln and Co., Feb. 1, 1809, F. C.). In either case, the buyer will be entitled to demand not only restitution of the price, but damages for any loss which the want of the article may have occasioned, even though it should have perished by an accident over which the seller had no control.

1083. (6.) If the time and manner of delivery be stipulated, these, by force of stipulation, are *inter essentialia* of the contract, and the contract will be violated unless the stipulations be complied with.

1084. (7.) If there are no stipulations on these points, delivery

must be made in a reasonable manner, and within a reasonable time after the price has been paid. (Cooper, 1791, M. 10100.) Wherever an established usage of trade can be discovered, it will govern the time and manner of delivery in the absence of express stipulations. If no place of delivery be fixed, the general rule is, that it shall be where the goods are at the time of the purchase; and if the buyer be at a distance, the seller's duty and risk end with delivery to the proper carrier. (Bell's Prin. 117.)

1085. *Delivery is either Actual or Constructive.*—The forms which have been established for the symbolical delivery which the law, till recently, required in the transference of heritable property, will be explained under Sale of Heritage.

1086. Actual delivery of moveables may be effected in many other ways than by simply placing the commodity in the hands of the purchaser:

1087. (1.) It may be delivered to his clerk, his servant, or his authorized and known agent. (Bell's Prin. 1302; 1 Bell's Com. 173.)

1088. (2.) It may be placed in his warehouse, or his cart, or his vessel; and these may be either in charge of his own servants, or of others hired by him for the purpose of receiving the goods. (Collins, 1804; Morrison, 14223.)

1089. (3.) It may be delivered into the warehouse of a wharfinger whom the buyer is accustomed to employ, or into the Queen's warehouse for his behoof. (Richardson, 3 Bos. and Pul. 127; Leeds, *ibid.*, 326; Scott, *ibid.*, 469; Strachan, Jan. 21, 1817, F. C.)

1090. (4.) The key of the warehouse, cellar, or other place of deposit where the goods are kept, may be delivered to him or to his accredited servant or agent. (Maxwell and Co., April 4, 1831, 5 W. S. 279.) Or,

1091. (5.) Real delivery may be effected by any other means by which the commodity is placed in the power of the buyer,

and beyond the power of the seller, provided this be done either at the seller's instance or with his consent.

1092. *Constructive Delivery* will be effected :

1093. (1.) By marking the goods—*e.g.*, trees, cattle, or the like—with the peculiar mark which he employs in his trade. In the case of cattle, it is desirable that they be removed to a field not belonging to the vendor. (Bell's Prin. 1303 ; Lang, July 6, 1832, 10 S. 777 ; Gibson, July 9, 1833, 11 S. 916 ; Mathison, Dec. 3, 1854, 17 D. 274.)

1094. (2.) By setting apart the goods in the seller's warehouse, and charging warehouse rent for them, with the buyer's knowledge and consent.

1095. (3.) By intimating a delivery order to a third party acting as custodier of the goods, or having them transferred in his books from the name of the seller to that of the buyer ; or by any other means commonly recognised as delivery in the branch of trade to which the transaction belongs. (Bell's Prin. 1305.) In all these cases payment of the price is also essential.

1096. *Failure to Deliver*.—If the seller fail to deliver, the buyer has three courses open to him : He may—1st, Annul the bargain, and so end the matter ; 2d, Insist for performance, and damages for delay ; or 3d, If performance could no longer serve his purpose, he may insist for damages for non-performance.

1097. 2. *Implied Conditions of Sale*.—(1.) The usages of trade, if not expressly excluded, are implied conditions in sale as in all other mercantile contracts. For example, a sale without specific conditions implies the credit usually given in the line of trade under which it falls. (Bell's Prin. 101 ; Bell's Com. 440 ; Sheriff, Nov. 21, 1828, 7 S. 47 ; Stewart, Feb. 17, 1831, 9 S. 466.)

1098. (2.) No local usage or custom will be admitted if it may reasonably be supposed to have been unknown to one of the parties. (Bell's Prin., *ibid.* ; Bell's Com., *ibid.*)

1099. (3.) *Weights and Measures*.—All British sales are ruled

by the imperial weights and measures; all local and customary measures having been finally abolished by 5 and 6 Will. IV., c. 63.)

1100. It is provided by that statute, that any one selling by any measure other than the imperial measures, or some multiple or aliquot part of such measures, shall be liable in a penalty not exceeding forty shillings for every such sale. But it is declared that this provision shall not prevent the sale of any articles in any vessel not represented as containing any amount of imperial measure, or any fixed local or customary measure heretofore in use.

1101. All weights and measures are ordered to be stamped, the weights on the top or side, the measures of capacity on the outside; and it is enacted that they shall not be stamped if made of lead or pewter, unless they be wholly and substantially cased with brass.

1102. The fiar's prices in Scotland must be struck by the imperial measure.

1103. The justices of the peace in counties, and the magistrates in county towns, are instructed to provide copies of the imperial weights and measures verified and stamped at Exchequer, for comparison with the weights and measures in use in their respective jurisdictions; to appoint inspectors for the safe custody of such copies, and for the other purposes of the Act, and to allot to each inspector a separate district.

1104. When the justices and magistrates shall agree, the whole or part of a county may be united with a Royal burgh, and placed under one inspector. The justices and magistrates are to provide stamps for the use of the inspectors; and determine on what days they are to attend, with the stamps and copies in their custody, at market towns, for the purpose of examining, comparing, and stamping if found correct, all such weights and measures as may be brought to them.

1105. Every person who shall be found, on complaint of a third party, to use any weight or measure other than those authorized by the Act, and stamped according to its provisions, or which shall be found to be light or otherwise unjust, shall forfeit a sum not exceeding five pounds; and *any contract or sale made by such weights or measures shall be wholly null and void.*

1106. It shall be lawful for every sheriff, justice, or magistrate, and for any inspector appointed by them, at all seasonable times, to enter any shop, stall, warehouse, etc., and there to examine all weights and measures; and if it shall appear that the weights or measures are light, or otherwise unjust, they shall be seized, and the person in whose possession the same shall be found shall forfeit a sum not exceeding five pounds.

1107. The same penalty is imposed upon those who shall refuse to produce their weights, or shall otherwise obstruct the examination.

1108. Penalties are likewise imposed on inspectors for the negligent or dishonest discharge of their duties; and it is provided, that in both cases the penalties shall be recoverable before a sheriff, or two or more justices or magistrates of any burgh in which the offence is committed.

1109. If the penalties are not paid within fourteen days, they may be levied by poinding and imprisonment for a period not exceeding sixty days.

1110. The penalties are directed to be applied to the fund liable to provide copies of the standards, after deducting so much as the magistrates shall order to be paid to the informer, which must not exceed one-half of the penalty.

1111. An appeal lies to the Court of Justiciary.

1112. (4.) If an order be given for several articles, it is an implied condition that the whole shall be sent, and the buyer is entitled to refuse a portion of the order. (Bell's Prin. 91; Bell's Ill. i. 94; Champion, 1 Camp. 53; Baldy, 2 Barn. and Cress. 37.)

1113. (5.) Where the buyer has seen and examined the goods, the maxim, that the "buyer's eye is his merchant," holds both in Scotland and England; and the subject cannot be refused unless either special warranty, sale for a special purpose, or fraud, be proved. (Stair, i. 9. 10; Ersk. iii. 3. 10; Bell's Prin. 96.)

1114. It will be considered fraud if the seller knew of a material latent defect, and concealed it, or if he framed a statement calculated to mislead. (Stair, *at supra*; Bell's Ill. i. 98, and iii. 105, 106; Bell's Prin. 96). There is to this extent, by the law of Scotland, notwithstanding the limitations to implied warranty introduced by the Mercantile Law Amendment Act, sec. 5, an implied warranty where the fault is latent, and known to the seller, even where the purchaser has seen the goods.

1115. The customary commendations bestowed on their commodities by tradesmen will not be regarded as fraudulent statements, so long as they are simply extravagant in degree. But if positively at variance with facts known to the seller, they will not be permitted to enjoy the protection which custom has extended to mere "puffing." (*Vide, infra, Special Warranty.*)

1116. (6.) Where goods are sold by sample, they may be rejected on implied warrandice, if they do not, on delivery, correspond with the sample. (Ib. 98, Van Oppen, Nov. 28, 1855, Session Cases, xviii. 113.

1117. (7.) When the goods are afterwards to be furnished to the buyer, and no sample is exhibited, they may be rejected if they do not possess the ordinary merchantable character of the commodity. (Bell's Prin. 98; 1 Bell's Com. 441; Watt, Feb. 6, 1829, 7 S. 372; Whealler, Jan. 9, 1843, 5 D. 402; Van Oppen, Nov. 28, 1855.)

1118. If the buyer does not make his challenge immediately, or at least without unreasonable delay, it will not free him from the contract. Where the fault is manifest, and the commodity

is of a kind to be injured by keeping, the challenge must be instantly made. Sometimes, by the custom of the particular trade, a certain time is allowed for examination. (Stair, i. 10. 15; Ersk. iii. 3. 10; Bell's Prin. 99; 1 Bell's Com. 439.)

1119. (8.) Solvency is an implied condition where sale is on credit; and if the buyer fail, or be *vergens ad inopiam*, the seller may refuse to proceed. (Bell's Prin. 100.)

1120. 3. *Express Conditions of Sale*.—Any conditions may be introduced by positive stipulation, provided they be neither illegal nor impossible.

1121. (1.) A special condition of "ready money" suspends the passing of the property even in questions with creditors. (Stair, i. 14. 4 and 5; Ersk. iii. 3. 11.; Bell's Prin. 103 and 109; Brodie v. Tod and Co., 20th May 1814, F. C.) It is supposed that, under such a stipulation by the seller, goods sold but not delivered would be attachable by the seller's creditors, notwithstanding the 1st clause of the Mercantile Law Amendment Act (19 and 20 Vict., c. 60).

1122. (2.) If the agreement be, that "a bill shall be given for the price," it is sufficient if the bill be sent after reasonable time has been taken to examine the goods. (Bell's Prin. 104.)

1123. (3.) If the agreement be, that the bill shall "be sent in course," the stipulation must be literally fulfilled. (Bell's Prin. 104; 1 Bell's Com. 441.)

1124. (4.) If a discountable bill be stipulated, the bill must be such as will at once produce money at the banks. (Bell's Prin. 106; 1 Bell's Com. 441.)

1125. (5.) An "approved bill" is one to which no reasonable objection can be made,—not a bill to be approved or rejected at the caprice of the seller. (Bell's Prin. 107. Hodgson v. Davies, 2 Camp. 532.)

1126. (6.) If a "bill" be stipulated for, it is held to be the buyer's own bill; and the seller may object to his credit—1st, If

the sale has been effected by a broker, and on inquiry he finds the buyer's credit insufficient. In this case, however, there must be no undue delay in intimating his dissent. 2*d*, If the buyer's circumstances have been concealed ; or 3*d*, If they have changed for the worse during the time between the bargain and the tendering of the bill. (Bell's Prin. 105 ; Bell's Ill. i. 106.)

1127. (7.) Where the goods are sold "on arrival of a certain ship," there is no sale if the ship perish. (Bell's Prin. 108.)

1128. (8.) Where the delivery is to be "on arrival, not beyond a certain day," there is no bargain unless the goods arrive in time for delivery. (Bell's Ill. i. 107 ; Bell's Prin. 108.)

1129. 4. *Sale and Return*.—This is either a sale conditional on approval generally, or within a specified time ; or an arrangement between wholesale and retail dealers (as between publishers and booksellers), where goods are sent to the latter on the understanding that those articles only are to be transferred which they can dispose of. (1 Bell's Com. 269 ; Bell's Prin. 109 ; More's Stair, p. lxxxviii.)

1130. 5. *Special Warranties*.—One of the leading objects of the Mercantile Law Amendment Act was to assimilate the law of Scotland to that of England as regarded warranties.

1131. The clause which has reference to this important subject is the following :—

1132. "§ 5. Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose."



1133. *Horses*.—It has been held (*Young v. Giffen*, Dec. 4, 1858) that the word “goods” in this section includes “horses and other animals.” The implied warrandice of soundness from serious defects, under which they have hitherto been sold in Scotland, is thus swept away, and the English practice of express warranty introduced. It will therefore be necessary in future that the pursuer allege express warranty.

1134. 6. *Payment* must be in cash, if insisted on. (Bell’s Prin. 127.)

1135. When the buyer’s bill, or note, or cheque, is taken in payment, he will not be discharged if it be dishonoured. (Bell’s Prin.; Everet, 2 Camp. 515.)

1136. But when bank notes, or the bill or the note of a third party, is taken, without indorsation or recourse on the buyer, the seller has no remedy if they should prove bad by insolvency of the bank or third party. The reverse will be the case if the buyer knew of the insolvency, or omitted any observance necessary for procuring payment. (Bell’s Prin. 127; Camidge, 6 Barn. and Cress. 373; *Read v. Hutchinson*, 3 Camp. 352.)

1137. If, on presenting the buyer’s bank cheque, the seller agree to receive as payment a bill on a third party, the buyer is discharged, though that bill be afterwards dishonoured. (Bell’s Prin.; Smith, 7 Barn. and Cress. 19; Alderson, 3 Barn. and Adolph, 660.)

1138. If the buyer refuse to take delivery, he will be liable in warehouse rent or damages to the seller. (Bell’s Prin. 128; 1 Bell’s Com. 443.)

1139. 7. *Of Stoppage in Transitu, and Retention of Goods by the Seller*.—The English rule, that goods of which the price has not been paid may be arrested in the course of their transit, either to the seller himself or to the destination which he has assigned them, if they be still in the hands of a *middleman*, was introduced into Scotland by a decision of the House of Lords towards the

end of last century. (*Allan, Stewart, and Co. v. Stein's Creditors*, 4th Dec. 1788 and 23d Dec. 1790, M. 4949.) It superseded the more comprehensive doctrine common to the rest of Europe, that restitution should be allowed to the seller if the buyer became bankrupt within three days, on the ground that he must have been aware of his position at the time of the sale. The doctrine of stoppage, which is of modern origin even in England, took its rise in Chancery, and was afterwards adopted by the Courts of Common Law.

1140. The right of stopping exists only in the seller himself (*Bell's Prin.* 1308; *Butler v. Woolcot*, 2 New Rep., in Com. Pl., 64), not in his creditors, nor in any factor, cautioner, or other person possessing only an incidental interest in the transaction; but a person sending goods to be sold on the joint account of himself and the consignee is entitled to stop them. By the Mercantile Law Amendment Act, 19 and 20 Vict., c. 60, the same rule has been adopted with reference to the retention of goods still in the custody of the seller. It is provided by that Act, that "where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery; and the right of the purchaser to demand delivery of such goods, shall, from the date of such sale, be attachable by, or transferable to, the creditors of the purchaser." (Sec. 1.)

1141. By the second section it is declared, that "the seller himself shall not be entitled to a right of retention, against a second or any subsequent purchaser; but with this proviso, that nothing in this Act shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods

sold, or such portion thereof as may remain unpaid or for the performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and the subsequent purchaser, or any such right of retention arising from express contract with the original purchaser."

1142. By section 4, the seller's rights are guaranteed against the original purchaser. "Any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller."

1143. The landlord's right of hypothec and sequestration for rent are saved from the operation of the statute. (Sec. 4.)

1144. The payment of a part of the price does not take away the right to retain or to stop, neither does the delivery of a part take away that right as regards the remainder. (Bell's Ill. i. 405; Bell's Prin. 1308; Com. 222; Hodgson, 7 T. R. 440.) Absolute bankruptcy of the buyer is not required. Insolvency, or such a change of circumstances as to justify a suspicion of the solvency, is sufficient to justify the seller in retaining or stopping delivery. (1 Bell's Com. 223; Paton on Stoppage in Transitu, p. 18, and cases cited.) If the goods are delivered to the clerks, servants, warehousemen, shipmasters, or other persons acting as the *hands* of the buyer, the right of stoppage is at an end. Goods still in the seller's warehouse, or in the hands of his people, may be retained, although he have given a delivery order to the buyer. (Bell's Prin. 1308; Bell's Com. 212.)

1145. The following may be enumerated as middlemen, or persons in whose hands goods may be stopped:—1. Carriers by land or water; 2. packers; 3. wharfingers; 4. warehousemen; 5. porters and all others employed in the carrying trade. (Bell's Prin. 1308; 1 Bell's Com. 213.)

1146. A middleman may, by special arrangement, become the agent of the buyer, *e.g.*, where a wharfinger's warehouse is made

### INDEPENDENT PERSONS.

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amounting to fraud on his part and on that of his creditors, if, after bankruptcy, they take delivery of goods which they know to be still subject to stoppage. (Bell's Prin. 1310; 1 Bell's Com. 232; see *Stein v. Hutchison*, 16th Nov. 1810, F. C.)

1151. *Modes of Stopping*.—No specific form or solemnity is necessary. The most complete stoppage will be either by the presentment of a bill of lading to the shipmaster, or by the warrant of a judge; but a private countermand will suffice, even though verbal. (Bell's Prin. 1309; 1 Bell's Com. 226.)

1152. Physical possession of the goods, even by the buyer himself, will not prevent stoppage or recovery, if he have failed to perform an express and absolute condition attached to the delivery, *e.g.*, that the price should be paid at the time, or a bill given. (1 Bell's Com. 223; *Bothlingk v. Scheider*, 3 Cap. 58.)

1153. When the goods have been delivered by mistake, after an order to stop has been received by the carrier, restitution may still be obtained. (Bell's Prin. 229.)

## II.—*Sale of Ships.*

1154. The transference and burdening of property in ships is now regulated by "the Merchant Shipping Act of 1854" (17 and 18 Vict., c. 104.)

1155. By sec. 19 it is provided that every British ship, except certain small coasting and fishing vessels, shall be registered, her name, tonnage, length, area, and the names and descriptions of her owner or owners; and if there be more than one owner, the proportions in which they are interested in the ship shall be set forth in the manner provided by the Act.

1156. The collector, controller, or other principal officer of Customs is appointed registrar at any port or place in the United Kingdom or Isle of Man, and beyond these limits it is usually the governor or lieutenant-governor of a colony, in conjunction with the officers of Customs. (Sec. 30.)

1157. Applications for registry shall be made by the person or persons requiring to be registered as owners, or by an agent authorized in writing; and a declaration of ownership and other particulars regarding the ship, shall be made by the applicant and subscribed before the registrar or a justice of the peace. (Secs. 35, 38.) In addition to the declaration, ownership must be established by a certificate from the builder. (Sec. 40.) Upon the completion of the registry, a certificate or extract of the registration shall be granted by the registrar.

1158. Any change which takes place in the registered ownership shall be indorsed on the certificate by the proper registrar at the port where the ship chances to be at the time. (Sec. 45.)

1159. *Transference.*—By sec. 55 it is enacted, that when a registered ship, or any share therein, is to be disposed of, it shall be transferred by bill of sale. Such bill of sale shall contain a description sufficient to identify the ship to the satisfaction of the registrar, and shall be executed by the transferer in the presence of, and be attested by, one or more witnesses. (Sec. 55.)

1160. A declaration having been made by the transferee, to the effect that he is entitled to be an owner of a British ship (sec. 56), “the bill of sale shall be produced to the registrar of the port at which the ship is registered, together with the declaration of the transferee; and the registrar shall enter in the register book the name of the transferee as owner of the ship or share contained in the bill of sale, and shall indorse on the bill of sale the fact of such entry having been made, with the date and hour thereof; and all bills of sale shall be entered in the order of their production to the registrar” (sec. 57).

1161. Similar regulations are introduced for the transmission of ships or shares in consequence of death, bankruptcy, or marriage.

1162. By sec. 66, a form of “mortgage” is provided, and it is directed that, on the production of such instrument, the regis-

trar of the port at which the ship is registered shall record the same in the register book.

1163. By subsequent clauses, provisions are made for the transference of mortgages, whether by sale or in consequence of death, bankruptcy, or marriage; and it is enacted that the mortgages shall be entitled to priority as documents of debt, according to the date at which they are recorded in the register book, and not according to their own dates.

### III.—*Sale of Heritage.*

1164. The sale of heritable property, in so far as it is a contract between buyer and seller, is regulated by the principles of the contract of sale already explained.

1165. Writing is indispensable to its constitution (Ersk. iii. 2. 2; Bell's Prin. 889; Menzies, p. 827); and, as some time must elapse before the titles of the seller can be examined, and the formal conveyance executed, it is customary for the parties either to execute a formal minute of sale, or to interchange written missives, fixing the conditions of the bargain. A complete contract is thus constituted. If not holograph of the parties, missives of sale must be authenticated like other probative deeds; and a minute of sale ought always to be a regular deed, written on stamped paper, with a clause of registration for diligence, and a testing clause. When missives of sale are not written on stamped paper, they must be stamped afterwards, before they can be founded on in a court of law. Where minutes of sale or missives are informal, the ordinary rules of *locus penitentiae*, *rei interventus*, and homologation apply to them. (Ersk. iii. 2. 2; Bell's Prin. 889; Menzies, 828.)

#### (1.) *Constitution and Transmission of Heritable Rights.*

1166. The constitution of heritable rights, and their formal transmission, whether by inheritance or purchase, are still regu-

lated in some degree, both in this country and in England, in accordance with the relations which subsisted between the overlord, or feudal superior, and his vassal, in a condition of society which, for centuries, has ceased to exist.

1167. It would be difficult to assign any purpose which the feudal system has served for many generations, except that of complicating the titles of heritable proprietors, and increasing the expense, and not unfrequently the risk, attending their transmission. So strongly, indeed, have the inconveniences of our law of heritable property been felt, that in almost every session in recent years, Parliament has effected some fresh innovation on its provisions. Still the skeleton of the feudal system has been permitted to remain; and, as an existing institution, must be placed in outline before the reader.

### (2.) *Constitution of Feudal Rights.*

1168. He who makes a grant is called the superior; he who receives it the vassal. The subject of the grant is the feu,<sup>1</sup> a word which, however, is sometimes used in a more special sense.

1169. According to the theory of the feudal system, the sovereign was the actual possessor, in the first instance, of the whole land of the nation; by him it was granted to his vassals on conditions of military service; and by them to sub-vassals on

<sup>1</sup> The origin of the word feu or feud has been a subject of much discussion amongst etymologists. By some, it is derived from the Latin *fides*, and *ead*, or *odh*, or *od*, Teutonic words, signifying a property or estate in land; whilst by others, and with perhaps greater probability, the whole word is maintained to be Teutonic, equivalent to *vieh*, cattle, ultimately from the same root with the Latin *pecus*, which, in the form of *pecunia*, came to signify property, and its representative money,—because, as Varro remarks, property amongst pastoral nations consisted of cattle. (Varr. De Lingua Latina, 5, 10, sec. 95, ed. Müll.) A feu or feudum, in this sense, would be a piece of land held for a pecuniary consideration, using *pecuniary* in the wide sense which its etymology suggests. See the merits of the two suggestions discussed in the article on the *Feudal System* in Chambers's new Encyclopædia.



the like conditions. The system of subinfeudation in Scotland was permitted to extend *ad infinitum*, notwithstanding an alleged attempt to abolish it so early as the reign of Robert I. (Menzies' Lectures on Conveyancing, p. 583.) In England, subinfeudation was prohibited by statute so early as the year 1290 (*Quia emptores*, 18 Ed. i., c. 1); the vassal being permitted to dispose of his rights only by putting the purchaser in his place, and enabling him to hold directly of the superior.

1170. In Scotland, heritage has always been transmissible by either of these methods. Where the system of subinfeudation is adopted, a new right of property is brought into existence at each stage of the transmission; and this is called *constituting a fee*. The formal instrument by which a fee is constituted, and a new feu created, is called a *feu-charter*. That by which it is transmitted is called a *disposition*.

1171. When a fee is constituted, a certain interest in it is always retained by the superior. This interest is called the *superiority*, or *dominium directum*; as opposed to the more substantial interest transmitted to the vassal, which is called the *property*, or *dominium utile*.

1172. In the earlier stages of feudality, the vassal was chosen by the overlord on the ground of his aptitude for military service, and the feu was granted him merely for life. After the fee became hereditary, the superior was in the habit of resuming possession during the minority of the vassal, on the ground that he was then unable to discharge his military duties. The value of this right on the superior's part was commuted for an annual payment, after the relation between him and the vassal had become pecuniary. This arrangement was called *taxed ward*.

1173. These military tenures were abolished in Scotland in 1747, as dangerous to public tranquillity; by 20 Geo. II., c. 50, and 25 Geo. II., c. 20, those held of the Crown being con-

verted into *blench* or *blanch holdings*, and those held of subjects into *feu holdings*.

1174. A *blench* holding involved the payment of a merely nominal sum, *e.g.*, a rose, a penny Scotch, a peppercorn, or the like, if asked only (*si petatur tantum*); *i.e.*, it was as nearly a free estate as the theory of the feudal system permitted. An estate absolutely free was called *allodial*, which is defined by Lord Stair to be that "whereby the right is without recognisance, or acknowledgment of a superior." Moveables, he says, are so enjoyed, "and lands and immoveables were so till those feudal customs." (ii. 3. 4.)

1175. A holding in *feu farm*, on the other hand, involved the payment of a valuable consideration, the extent of which was matter of arrangement between the parties. These latter are the ordinary *feu-duties* of the present day.

1176. In addition to the dues thus paid for the recognition of his right, certain occasional payments, called *casualties*, were made by the vassal to the superior. The only casualty now in use is that which is payable to the superior on the transmission of the fee, either to the heir of the vassal or the purchaser of the estate, and is called *relief* or *composition*. On entering with the superior, a year's rent is exigible from the vassal, unless otherwise provided in the grant; but it is often restricted in the grant to a duplication of the *feu-duty*, and is then said to be *taxed*. Where it is not taxed, only the *net* rent is exigible, after deducting all public burdens, and one-fifth for *teind*. The superior is entitled always to have an entered vassal; and should the vassal refuse to enter, the property may be evicted. On the other hand, the vassal may compel the superior to enter him, and on refusal, may pass his immediate superior by, and enter with a higher superior. (On the subject of this sec. generally, the following writers may be consulted:—Stair, i. 2. 13, ii. 3; Ersk. ii. 3; Bell's Prin., sec. 676, *et seq.*; Ross' Lec., ii., p. 23, *et seq.*; Craig,

de Feudis, the Libri feudorum usually annexed to the Corpus juris; Hallam's Middle Ages, i., p. 200, *et seq.*; Sir Francis Palgrave's Rise and Progress of the English Commonwealth, and his Histories of Normandy and England; Thorpe's translation of Lappenberg; Stephen's Commentaries, etc.

(3.) *Of the Transmission of Heritable Rights.*

1177. From the enumeration in the foot-note<sup>1</sup> of the recent enactments which have had the simplification of our land rights and of the modes of their transmission for their object, it will be apparent that any attempt at a history of the various changes to which the law of heritable property has been subjected, even during the last ten years, would greatly exceed the limits of a work like the present. We shall content ourselves by attempt-

<sup>1</sup> 1. To facilitate the transmission and extinction of heritable securities for debt in Scotland, 8 and 9 Vict., c. 31 (30th June 1845).

2. To simplify the form, and diminish the expense, of obtaining infeftment in heritable property in Scotland, 8 and 9 Vict., c. 35 (21st July 1845).

3. To amend the law and practice of Scotland as to the service of heirs, 10 and 11 Vict., c. 47 (2d June 1847). (*Ante*, p. 155.)

4. To facilitate the transference of lands and other heritages not held burgage, 10 and 11 Vict., c. 48 (25th June 1847).

5. To facilitate the transference of lands and other heritages held in burgage tenure, 10 and 11 Vict., c. 49 (25th June 1847).

6. To facilitate constitution and transmission of heritable securities for debt, and to render the same more effectual for the recovery of debts, 10 and 11 Vict., c. 50 (25th June 1847).

7. To amend the practice with regard to Crown charters and precepts from Chancery, 10 and 11 Vict., c. 51 (25th June 1847).

8. To extend the benefits of two Acts (Nos. 1 and 6) relating to the constitution, transmission, and extinction of heritable securities in Scotland, 17 and 18 Vict., c. 62 (31st July 1854).

9. To simplify the form and diminish the expense of completing titles to lands in Scotland, 24 and 22 Vict., c. 76 (2d August 1858).

10. To extend certain provisions of the titles to Land (Scotland) Act, 1858, to titles to land held by burgage tenure; and to amend the said Act, 20 and 24 Vict., c. 143 (28th August 1860).

ing to gather, chiefly from the two last, and, 'as such, the most important of these statutes, a brief account of the manner in which a title to land may, for the present, be acquired and transmitted.

1178. *Instruments of Conveyance*.—Charters, dispositions, bonds, and other deeds, by which heritable rights and securities are constituted and transmitted, whether from the Crown, as their original source, to a subject, or from one subject to another, having been very extensively modified, and very greatly shortened by the previous enactments, are, with exception of a few alterations, which the provisions of these Acts have rendered indispensable, left unchanged by the Lands' Titles Acts of 1858 and 1860.

1179. Their leading object is to remove certain unnecessary steps between the granting of such deeds by the seller, and the completion of the buyer's title, by the recognition of the transference on the public records.

1180. The old symbolical ceremony of *infestment*, by which the superior, or his representative, gave to the vassal, or his attorney, what was regarded as equivalent to physical possession of the land by the delivery of earth and stone; or of burgage property by other appropriate emblems, had already been abolished by 8 and 9 Vict., c. 35. But though the visit to the lands was dispensed with, the notarial instrument, in which the ceremony of infestment, and the subject with reference to which it took place were described, still continued to be indispensable; the deed of conveyance, in place of completing the title to the lands, acting only as a warrant for its completion by infestment, and for the execution and registration of the instrument in question. It was not the conveyance, but the instrument of *sasine*, which entered the record, and thus in reality constituted the most important part of the title to the lands.

1181. The principle of recording the deed by which the right

was conferred or transmitted, in place of an instrument, in which the fact of its having been so conferred or transmitted was narrated, had already been introduced in regard to heritable securities by 8 and 9 Vict., c. 81. By sec. 1 of that Act it is provided, that "where an heritable security has been constituted by infestment, the right of the creditor therein may be transferred, either in whole or in part, by an assignation or other deed of conveyance; and, on such assignation or conveyance being recorded in the general register of sasines, or in the particular register or burgh register of sasines applicable to the lands contained in the security, the said heritable security shall be transferred to the assignee as effectually as if such heritable security had been disposed and assigned, and the disposition and assignation or conveyance had been followed by sasine duly recorded according to the present law and practice."

1182. This principle the recent statutes have extended to all conveyances of land. Their provisions are simply permissive, the old forms being still allowed to be used, and they cannot thus be said to abolish instruments of sasine; but they dispense with the necessity for them in every case, and former experience of similar permissions has proved them to be equivalent to abolition of the old forms.

1183. It is further provided that conveyances, when presented for registration; shall have a warrant written on them, specifying the person on whose behalf they are presented, and signed by him or his agent. By this arrangement, a conveyance, which may be in favour of several individuals, operates, when registered as an infestment, only in favour of the party thus indicated.

1184. Also following the principle already adopted in the Heritable Securities Act, these statutes provide for the contingency of a conveyance containing matter which it is unnecessary and undesirable to record. In such cases an instrument is to be prepared by a notary, setting forth generally the nature

of the deed, and containing at length those portions by which the lands are conveyed, and real burdens, conditions, or limitations imposed. A similar course is to be adopted where the deed conveys separate lands or separate interests to the same or different persons.

1185. But it is only in cases of necessity that a notarial instrument, even of the kind contemplated, is to be resorted to, the object of the Act being, in all cases, to facilitate the recording of the conveyance itself. It is therefore provided (sec. 3), that it shall be competent to insert, immediately before the testing clause of any conveyance, a clause of direction, specifying the part or parts of the conveyance which the granter desires to be recorded; and, when such clause is inserted, the keeper of the register shall be guided by it in recording the deed.

1186. The 4th section of the statute of 1858 dispenses with another writ, called an instrument of resignation *ad remanentiam*, in the same manner in which the instrument of sasine is dispensed with by sec. 1. Resignation *ad remanentiam* is the ceremony by which a feudal right is permanently restored by the vassal to his superior; its object being to consolidate both the property and superiority in the hands of the latter. The instrument of resignation was the deed in which a notary set forth the act of resignation, which took place in virtue of a warrant from the resigner to his procurator, called a *procuratory of resignation*. This procuratory has been rendered unnecessary by 10 and 11 Vict., c. 48, sec. 3, whereby a clause for resigning to be inserted in the conveyance was substituted. The statute referred to declares, that in future it shall be sufficient for the superior, in whose favour the resignation under the procuratory or conveyance is made, to record the procuratory or conveyance itself, with a warrant of registration thereon; or, should the circumstances of the case require it, a notarial instrument may be prepared and recorded as in an ordinary conveyance.

1187. As a consequence of dispensing with the instrument of sasine, it is declared, that it shall be no longer necessary to insert in conveyances a clause of obligation to infeft, or a precept of sasine or warrant for infeftment. The clause known as the *tenendas*, in which the manner of holding, or annual duty, or consideration, in virtue of which the lands are held of the superior, may still be inserted, no change having been made by the Acts, either on the rights of superiors or the obligations of vassals; but if not so inserted, the conveyance shall be held to imply that the lands are to be holden in the same manner in which the granter of the conveyance held, or might have held them.

1188. In the usual form of a disposition, a double manner of holding is inserted *à me vel de me*, and under this clause the disponent holds the subjects disposed of the seller, till he enters with the seller's superior. Since it was not the object of the Acts to abolish the feudal relation of superior and vassal, it was necessary that arrangements should be made for facilitating its formation and transmission. With the view of rendering the investiture of the vassal simpler and less expensive, it is consequently provided, by the first of these Acts, that in place of the former charters of confirmation by which the superior recognised in the person of a disponent the rights which had been conveyed to him by the vassal, and in which it was requisite that the description and destination of the lands as contained in the conveyance should be repeated, it shall in future be competent for the disponent to call, in the case of crown lands (sec. 6), on the presenter of signatures, and in the case of other lands, on the subject superior (sec. 7), to confirm him by means of a writ of confirmation to be written on the deed or instrument of conveyance itself in a form prescribed by the Act. The description and destination of the lands being contained in the body of the conveyance, do not require to be repeated in the writ of confirmation.

1189. Where the investiture is to be by resignation, similar provisions are made for the substitution of a short writ for a charter, whether the lands are held of the crown or of a subject superior. (Secs. 8 and 9.)

1190. Where there is only a general conveyance of lands, the general disponent may now complete a title by registering a notarial instrument in the form prescribed in section 12.

1191. The preceding clauses being simply permissive, it is provided (sec. 10) that it shall not be requisite for those who prefer to retain the charter to set forth the *tenendas* and *reddendo*, or feudal conditions on which the lands are held, but shall be sufficient to refer to any other charter or writ recorded in a public register in which they are contained.

1192. The transmission of the feudal right to purchasers being thus provided for, the case of heirs is next dealt with (sec. 11); and, as it is no longer necessary that the superior should direct the heir to be infeft, what was formerly a precept or command has been changed, in the case of land had on both tenures, into a simple writ or acknowledgment of *clare constat*. In this writ the superior merely declares that "it clearly appears" that the ancestor died last vest in the lands, and that the claimant is his heir.

1193. Provision is made in the relative sections for the appropriate registration of all the deeds thus simplified; and it is declared that the granting each investiture shall act as a confirmation, by the superior, of the whole deeds and instruments necessary to be confirmed in order to its completion.

1194. Where a party has acquired right to a conveyance before it has been recorded, he is permitted to assign it, and the assignation may be recorded along with the conveyance, or a notarial instrument may be recorded in cases in which that course may be requisite or preferred. By this means the assignee is placed in the same position as if the original conveyance had been granted and recorded in his favour.



1195. The Acts next make various provisions for shortening conveyances, by permitting a reference to be made to former deeds, in place of the repetitions of their provisions which were formerly required in every new transfer. These and subsequent provisions, in which simpler modes of completing titles are introduced in the case of judicial factors, trustees in bankruptcy, and liquidators of joint-stock companies, are of too technical a character to admit of their being explained to the general reader.

1196. By section 23 of the statute of 1858, an extremely simple method of extinguishing mid-superiorities has been substituted for the cumbrous and expensive proceedings which were formerly requisite for that purpose. The superior is empowered to grant a simple deed of relinquishment, and this one deed, having written on it first the acceptance of the vassal, and then the investiture of the over-superior, shall, when recorded in the appropriate register of sasines, be held to extinguish the mid-superiority.

1197. The statute further authorizes the combination of actions of constitution and adjudication against an apparent heir, whether he renounces the succession or not, and declares that the citation, in the combined action, shall have the effect both of a general and a special or general special charge, as circumstances may require. The decree of adjudication thus obtained against the apparent heir, is further declared to be equivalent to a conveyance from the ancestor. (Sec. 27.) By this section also, as formerly mentioned, the privilege of the heir, known as the *annus deliberandi*, is restricted from a year to six months. The 21st section of the Act of 1860 deprives all future town-clerks of the exclusive privilege which they have hitherto enjoyed, of preparing conveyances, instruments, and other writs applicable to lands held burgage. The fees of existing town-clerks are reserved, but no future town-clerks are to have claims for compensation for loss of fees. The fees payable to town-clerks, and keepers

of registers of sasines, for recording deeds, are to be regulated from time to time by the Court of Session.

1198. Such are the leading features of an enactment which has done a good deal towards simplifying the transference of heritage, and which, at no distant date, will probably make way for still simpler arrangements.

#### IV.—*Sale by Auction.*

1199. An auction, or roup, is an arrangement for offering property to the competition of purchasers.

1200. *The Articles of Roup*, being the conditions under which the seller exposes his property to sale, form an integral part of the contract between the seller and purchaser. This contract is completed by the offer or bidding, on the part of the purchaser, and the acceptance by the seller or his representative, which is formally declared by the fall of the auctioneer or salesman's hammer, the running of a sand-glass, or any other means which may have been specified in the articles of roup. (Menzies, 838.)

1201. The articles of roup usually narrate the nature of the right to be conferred, regulate the manner of bidding, prescribe the order in which offerers are to be preferred, and name a person who shall be empowered to determine disputes between bidders and declare the purchaser, called the judge of the roup.

1202. Before the sale commences these articles are read over, or otherwise published, to the intending purchasers. They must be executed on stamped paper.

1203. In the sale of heritable subjects, it is usual for the articles of roup to contain a clause of registration, by which the parties consent to a decree going out in terms of the conditions which the article contains, and under which they may be enforced by legal diligence. (Menzies, 839.)

1204. A minute of the offers is made generally on the back of the articles, and signed by each offerer.

1205. The implied conditions, which are binding on the seller and purchaser in all auctions, in addition to those expressed in the articles of roup, are—1st, That the seller shall not attempt to raise the price by means of fictitious offers, but shall fairly expose the article to the competition of the purchasers; and 2d, that the purchasers shall not combine to suppress competition. (Maclellan's Erskine, ii., p. 674, note 3; Bell's Prin. 131.)

1206. *An Upset Price*, or price below which the subject is not to be sold, may be fixed by the exposor, or he may reserve to himself in the articles of roup a power to offer; but unless he does so in express terms, he cannot legally interfere with the sale, either by offering himself or appointing another to do so for him. If there be no express provision to the contrary, it is thus an implied condition, that the sale is "without reserve," or "at the pleasure of the company." (Idem.)

1207. The conditions embodied in the articles of roup cannot be controlled by any verbal declaration of the auctioneer. (See on this subject More's notes on Stair, lx., lxiv., xci.; Ersk. iii. 3. 2, and Ivory's note; Brown on Sale, 578; Bateman on Auctions; Sugden's Law of Vendors and Purchasers.)

### CHAPTER III.

#### OF THE RIGHTS AND BURDENS ATTACHING TO HERITABLE PROPERTY.

##### 1. *Public Burdens.*

1208. In addition to taxation, local and general, which falls clearly beyond the scope of the present work, there are certain rights which the public possess over the landed property of the country, and which constitute burdens on its proprietors or occupiers. Though properly belonging to the department of public law, of which we do not profess to treat, these burdens are

commonly viewed in connection with the rights of individuals, and we shall therefore mention them very briefly.

1209. (1.) *Public Roads, or Highways*.—The right of highway is a right of property in such a portion of soil as will afford a passage over the property of private individuals, which is vested in the Crown as the representative of the public. (Stair, ii. 7. 10 ; Ersk. ii. 6. 17 ; Bell's Prin. 659.)

1210. The distinction between a public and a servitude road will be stated in treating of the latter.

1211. The earlier statutory arrangements placed the public roads of Scotland under the management of the Commissioners of Supply and Justices of the Peace. (1617, c. 8 (1669, c. 16 ; 1670, c. 9 ; 1686, c. 8 ; 11 Geo. III., c. 53).) Subsequently, local acts were passed, giving power to trustees to apportion the statute labour, or amount of work to be furnished annually by tenants and cottars in the country, and by the inhabitants in burghs, for the repair of highways not turnpike ; and to levy tolls and borrow money on the security which these tolls afforded, for the support of such as were turnpike. Great abuses arose out of the manner in which these Acts were obtained and administered, and, as a remedy, the General Road Acts (4 Geo. IV., c. 49 ; 1 and 2 Will. IV., c. 43) were passed. Notwithstanding the attempt thus made to reduce the management of the highways to an uniform system, the peculiar circumstances of each district have been found to necessitate so many reservations, that local acts have been passed for almost every county. These acts are to be read as if the last General Act (1 and 2 Will. IV., c. 43) were incorporated with them. The leading subjects which this very important statute embraces, are—the qualifications and powers of trustees, regulations for driving vehicles, the exaction of tolls, the erection of toll-bars, the penalties for evasion of tolls, the cutting of ditches and drains, the encroachments upon and obstructions to highways, the compensation to be given to

proprietors, the construction of foot-paths, pruning of hedges, etc.

1212. A highway must be at least twenty feet broad, not including the ditches, and powers are conferred on the trustees to widen all highways to that extent. They are further empowered to widen them where necessary to forty feet, compensation in this case being given for the ground taken beyond the twenty feet.

1213. Jurisdiction under the General Road Act is vested in the Justices of Peace and Quarter Sessions, and the review of the Court of Session, is excluded. An excellent digest of the Road Act, and of the decisions connected with highways, will be found in Mr Sheriff Barclay's "Law of the Road," and also in his "Digest of the Law of Scotland for Justices of the Peace." The latter work contains an enumeration of the statutes on the subject from David II. downwards. No Act has been passed since its publication, though a very important one for the abolition of tolls has been long pending.

1214. *Right of Way*.—The existence or non-existence of a right of way on the part of the public is often a question of extreme difficulty, the solution of which depends on a multitude of circumstances, which render almost every case a new one.

1215. As to jurisdiction, it may be stated, that where what is called a "possessory judgment" is sought on the ground that use and possession of the road for a period beyond seven years can be proved, the Sheriff Court is a competent tribunal; but it is not competent for the Sheriff to decide whether or not there be evidence sufficient to cut the proprietor off from his right to exclude the public on the ground that the prescription of forty years has not run against him. (M'Donald v. Watson, Feb. 23, 1830, and Wilson v. Henderson, March 2, 1855.) This latter question must be tried by declarator before the Court of Session.

1216. (2.) *Sea-shore*.—Closely analogous to the right of high-

way is the right which the public possess to the sea-shore. The seas and sea-shores of Great Britain are said to be *inter regalia*, i.e., they belong to the Crown for the public use. The shore comprehends all between high and low water-mark; but by the former term is meant only the point which the sea reaches in ordinary spring tides. (Stair, ii. 1. 5; Ersk. ii. 1. 6, and 6. 17; Bell's Prin. 641; Inst. lib. ii., tit. i., secs. 1. 3.)

1217. "There is no substantial distinction between a grant of land as bounded by *the sea*, and as bounded by the *sea-shore*; the shore is given in both cases, subject to public use.

1218. "After a grant so bounded, nothing remains in the Crown but the public trust; and no private person can, by subsequent grant or otherwise, be allowed to interpose between the grantee and the shore." (Bell's Prin., sec. 643, and cases cited.)

1219. Nearly all the sea-shores of Scotland have been granted to private individuals under the burdens and limitations mentioned in these sections.

1220. Where a proprietor possesses lands bounded by the sea-shore, with "parts, pendicles, and pertinents," he has an exclusive right to shell, sand, wreck, seaware, etc., though his titles contain no express grant of the shore. (*Macalister v. Campbell*, Feb. 7, 1837.)

1221. But the salmon-fishings around the sea-coast of Scotland form part of the hereditary revenues and belong exclusively to the Crown, so far as not *expressly* granted, by charters or otherwise, to subjects or vassals. (*Gammell and others v. Woods and Forests*, House of Lords, March 28, 1859.)

1222. *Navigable Rivers*.—The banks of navigable rivers are also public, and the same rules apply to them as to the sea-shore. (Ersk. ii. 1. 5; Bell's Prin. 648.)

1223. *The Sea*.—The high sea is the common property of nations; no nation has precedence there; and the jurisdiction of

each is limited to its own subjects, within its own ships. But the rights of the sovereign, as guardian of the people, extend by our law to the seas which wash the coast to the distance, it is said, of a cannon-shot; and to all bays, creeks, arms of the sea, and navigable rivers. These rights include—1<sup>st</sup>, the right to forbid the passage of enemies; 2<sup>d</sup>, the right to levy tolls or duties; 3<sup>d</sup>, jurisdiction, including right of search; 4<sup>th</sup>, the right of flag; 5<sup>th</sup>, the right of fishing, and taking all wreck and goods found on or under the sea, except such as are claimed and identified. (Stair, ii. 1. 5; Ersk. ii. 1. 6; Bell's Prin. 639 and 640.)

1224. By 6 and 7 Vict., c. 79, to carry into effect a convention between her Majesty and the King of the French concerning the fisheries in the seas between the British Islands and France, the limits within which the general right of fishing is exclusively reserved to the subjects of the two kingdoms respectively, are fixed at three miles' distance from low water-mark. With respect to bays, the mouths of which do not exceed ten miles in width, the three-mile distance is measured from a straight line drawn from headland to headland. (Declaration in Sched., Art. ii.)

1225. *Ports and Harbours*.—Free ports are also *inter regalia*; and the sole right of erecting public ports and harbours is in the Crown, unless where limited by Royal or Parliamentary grants to communities or subjects. (Stair, ii. 1. 5; Ersk. ii. 6. 17; Bell's Prin. 654.)

1226. The public are entitled to insist that the harbour shall be kept up so far as the means afforded by the dues extend; but the grantee is not bound to improve or repair it out of his own means. (Bell's Prin. 655; Christie, May 16, 1828, 6 S. 1813.)

1227. *Railways*.—These lines of communication, in the eye of the law, stand in a totally different position from the highways which, in so many respects, they have superseded. Though regulated by public and general statutes (Companies Clauses Consolidation Act, 8 and 9 Vict., c. 17; Lands Clauses Con-

consolidation Act, 8 and 9 Vict., c. 19; Railways Clauses Consolidation Act, 8 and 9 Vict., c. 33), each railway is the property of a joint-stock company, and as such a private undertaking.

1228. The powers of central control over railways, which in 1846 (9 and 10 Vict., c. 105) were vested in a board of railway commissioners, were in 1851 (14 and 15 Vict., c. 64) restored to the Board of Trade.

1229. All property being held under the condition of being surrendered on a valuation if required for the public service, the proceedings by which a sale of lands is effected, under the sanction of Parliament, for railway purposes, though of more frequent occurrence than others of a similar nature, have nothing peculiar in principle. Liability to compulsory sale by authority of Parliament may thus be included amongst the burdens which attach to all heritable property.

1230. An important statute relating to this subject is the Act to "facilitate the abandonment of railways, and the dissolution of railway companies in certain cases." (13 and 14 Vict., c. 83, 1850.)

1231. As to the Act "for the better regulation of the traffic on railways (17 and 18 Vict., c. 31, 1854), see Carriage.

1232. By 7 and 8 Vict., c. 85, it was enacted that cheap trains shall be provided for the poorer class of passengers, to run the whole length of each railway, each way, daily, under certain regulations, of which the most important are—that they shall be furnished with seats and protected from the weather, and that the fare for each third-class passenger shall not exceed one penny for each mile travelled.

1233. This enactment is explained and modified by the subsequent statute to "amend the law relating to cheap trains, and to restrain the exercise of certain powers by canal companies being also railway companies" (21 and 22 Vict., c. 75), passed in 1858.



1234. The provisions of this Act as to cheap trains are, that for all fractions of a mile, where the whole distance travelled is less than one mile, one penny may be charged; and for all fractions exceeding half a mile, where the whole distance travelled amounts to one mile or more, one halfpenny may be charged.

1235. No fare heretofore charged to or received from a third-class passenger, shall be deemed to have exceeded the rate prescribed by 7 and 8 Vict., c. 85, "if the same shall not have exceeded the rate of one farthing for each entire quarter of a mile travelled." (Sec. 2.)

### *Servitudes.*

1236. As these are not only imposed on, but exist in favour of, private parties, they may here be viewed either as rights or as burdens.

1237. I. *Personal Servitudes*, which are pecuniary burdens on real property constituted in favour of a particular individual, have already been considered under the heads of *Terce* and *Courtesy*. (*Ante*, pp. 31, 32, 33.)

1238. II. *Predial or Real Servitudes*, are burdens imposed upon one heritable possession in favour of another. The rights which these burdens imply, pass of necessity to the owners or occupiers of the property in favour of which they have been constituted. (Stair, ii. 7. 5, More's notes, ccxx.; Ersk. ii. 9. 5; Bell's Prin. 981.)

1239. The property on which the burden is laid is called the *servient tenement*, that in favour of which it is imposed the *dominant tenement*.

1240. Real servitudes are further divided into those which have reference to lands, and those which have reference to house property in towns. (Stair, ii. 7. 5; Ersk. ii. 9. 6; Bell's Prin. 983.)

1241. 1. *Rural Servitudes*.—Of these the most important are :

1242. (1.) *Road or Passage*.—The right of passage is of three degrees :—1<sup>st</sup>, foot-road ; 2<sup>d</sup>, horse-road ; and 3<sup>d</sup>, cart or carriage-road. (Stair, ii. 7. 10 ; Ersk. ii. 9. 12 ; Bell's Prin. 1010.)

1243. Whilst highways (*ante*, p. 207) are open to all the subjects of the realm, the most extensive servitude of road does not extend beyond the dominant proprietor or proprietors. The servient proprietor, moreover, continues to be proprietor of the *solum*, or soil over which the servitude exists ; and as a consequence of this proprietary right, he is entitled to change the direction of the road, provided the new one be equally convenient for the dominant proprietor. (Ersk. ii. 9. 12 ; Bell's Prin. 1010 ; Bruce, June 25, 1748, M. 14525 ; Ross, Feb. 19, 1751, M. 14531 ; Magistrates of Renfrew, July 5, 1823.)

1244. There is no obligation on the servient proprietor to maintain the road. (Ersk. ii. 9. 1 ; Bell's Prin. 1010 and 984.)

1245. (2.) *Pasturage*, by which the proprietor of the dominant tenement is entitled to pasture a certain number of cattle on the grass of the servient tenement. (Stair, ii. 7. 14 ; Ersk. ii. 9. 14 ; Bell's Prin. 1013.)

1246. Where the right extends over a common, though it be indefinite as to the number of cattle to be pastured, it is not in reality unlimited, but is regulated as to its extent by the number of cattle which each of the dominant possessions is capable of foddering during the winter. (Ersk. ii. 9. 15 ; Bell's Prin. 1013 ; E. of Breadalbane, 1741, 5 B. Sup. 710.)

1247. The action by which the rights of parties having such servitudes, or rights of joint ownership over a common, are adjusted, is called an action of *souming* and *rooming*. (So spelled by Stair, B. ii., tit. vii., sec. 14.)

1248. (3.) *Feal and Divot*, is a right in the proprietor of the dominant tenement to cut and remove turf for constructing

fences, covering houses, or the like purposes. (Stair, ii. 7. 13 ; Ersk. ii. 9. 17 ; Bell's Prin. 1014.)

1249. (4.) *Fuel* is a right to cut, winnow, and carry away peats from the servient moss or peat land, for fuel to the inhabitants of the dominant tenement. (Idem.)

1250. These servitudes do not convey a right to provide for anything beyond the ordinary uses of the actual occupants of the dominant tenement.

1251. 2. *Aqueduct*.—The owner of the dominant tenement, in the enjoyment of this right, is bound to maintain the conduits, pipes, etc., in such a condition as to prevent their injuring the servient lands ; the servient proprietor being bound, on the other hand, to allow reasonable access for repairs. (Stair, ii. 7. 12 ; Ersk. ii. 9. 13 ; Bell's Prin. 1012.)

1252. The dominant proprietor is not bound to repair injuries occasioned by floods. (Parson of Dundee, 1768, M. 14521 ; Carlisle, 1731, M. 14524 ; Wallace, 1761, M. 14511 ; Weir, Feb. 14, 1832, 10 S. 290 ; Thorburn, Dec. 4, 1841, 4. D. 169.)

1253. *Watering of Cattle*.—The *aquæ haustus* of the Roman law is sufficiently explained by its name. It does not deprive the servient proprietor of the right of watering his own cattle at the stream, well, or pond to which it applies. (Stair, ii. 7. 11 ; Ersk. ii. 9. 13 ; Bell's Prin. 1011 ; Beveridge, Nov. 18, 1808, F. C.)

1254. 3. *Urban Servitudes*.

1255. (1.) The servitude of support (*oneris ferendi, et tigni immittendi*) is a right to rest a wall, or a beam, on the neighbouring building. (Stair, ii. 7. 6 ; Ersk. ii. 9. 7 ; Bell's Prin. 1003 ; Murray, 1715, M. 14521 ; Young, Feb. 24, 1831, 9 S. 500.) A mutual gable is the property of the builder, and though it rest partly on the adjoining subject, he may prevent the owner of that subject from making use of it, until he has paid half the expense

of building it. (*Hunter v. Luke*, June 2, 1846 ; *Law v. Monteith*, Nov. 30, 1855 ; *Earl of Moray v. Aytoun*, Nov. 30, 1858.)

1256. (2.) *Stillicide and Fluminis*.—The first is the servitude of receiving the eavesdrop, the latter the collected water (*flumen*), from a neighbour's house. (*Stair*, ii. 7. 7 ; *Ersk.* ii. 9. 9 ; *Bell's Prin.* 1004 ; *Clark*, 1760, M. 13172 ; *Stirling*, 1752, M. 14526.)

1257. (3.) *Light or Prospect*, is a restraint on the absolute use of his property by the servient proprietor, to the effect of preventing him from raising an obstruction to the light or view of the dominant proprietor. (*Stair*, ii. 7. 9 ; *Ersk.* ii. 9. 10 ; *Bell's Prin.* 1005 ; *Ogilvie*, Feb. 5, 1678, M. 14534 ; *Forbes*, July 1, 1724, M. 14505 ; *Glassford*, May 12, 1808, F. C.)

1258. *Altius non tollendi*, the servitude of not building above a certain height. In this country it is often a servitude *not to build at all* ; and as such it is spoken of by Mr Bell. (*Stair and Ersk.* idem ; *Bell's Prin.* 1007 ; *Walker*, July 7, 1825, 4 S. 148 ; *Mutrie*, June 26, 1810, F. C. ; *Cockburn*, July 1, 1825, 4 S. and D. 128 ; *Ross*, March 3, 1854, 16 D. 732.)

1259. *Thirlage*.—By this servitude, the proprietors or tenants of lands are bound to carry the grain which their lands produce to be ground at a particular mill, for payment of duties specified in the conveyance, lease, or other deed by which the servitude is constituted. The principal duty is called *multure* ; and the smaller duties, called *sequels*, which fall to the servants of the mill, are known by the significant names of *knaveship*, *bannock*, *lock* or *goupen* (such a quantity as may be lifted with both hands). (*Stair*, ii. 7. 15, *et seq.* ; *More's notes*, ccxxv. ; *Ersk.* ii. 9. 18, *et seq.* ; *Bell's Prin.* 1017, *et seq.*)

1260. *Stipend*, the provision for the support of the clergy of the Church of Scotland, though neither a servitude nor a Crown right, may be here mentioned as being, in country parishes at least, a permanent burden on landed property. It consists of

payments in money or grain, or both, the amount of which varies with the extent of the parish and the state of the free teinds, or other funds set apart for the purpose. Whitsunday and Michaelmas are the terms at which stipend is due. If a minister is admitted before Whitsunday, he is entitled to the whole year's stipend, because his entry is held to have been prior to the sowing of the corn; and if his interest has ceased before that term, he has no claim on the fruits of the year. If he is admitted after Whitsunday and before Michaelmas, he is entitled to half the stipend, the other half going to his predecessor. The reason why the term for the payment of stipends is Michaelmas, and not Martinmas, is, that they come in the place of tithes, which were due in harvest. Ministers' stipends prescribe in five years. (See Prescription, 222.)

1261. *Vacant Stipends* were formerly at the disposal of the patron for pious uses, but they have been given by statute to the Ministers' Widows' Fund (the Acts now in force are, 19 Geo. III., c. 20; 54 Geo. III., clxix.), with the exception of such portions as had formerly (1672, c. 13) been reserved to the representatives of the deceased.

1262. As to these the following is the rule:—If a clergyman die after Whitsunday, his executors have right to the first half of the year's stipend, and his widow and nearest of kin to the other half as "ann." If he survive Michaelmas he has right to the whole of the year's stipend, and his nearest of kin draw the first half of the next year's stipend as ann. (Stair, ii. 8. 34; Ersk. ii. 10. 54.)

1263. The annual rates payable to the Ministers' Widows' Fund are declared to be privileged debts, "and preferable to all other debts of the said ministers, etc., not only upon their benefices and salaries respectively, but also upon their whole personal estate." (19 Geo. III., c. 2, sec. 19.)

1264. *The Church*.—The expense of building and repairing

the parish church lies on the heritors. (Ersk. ii. 10. 63 ; Bell's Prin. 1164 ; Kirk-session of Lander, 1630, M. 7913 ; Boswell, Dec. 9, 1834, 13 S. 148.)

1265. The presbytery may, when necessary, decern for a new church, after appointing a visitation and report by tradesmen, and giving notice from the pulpit. Their decision is subject to review by the Court of Session. The heritors are not bound to rebuild if the church be repairable, though too small for an augmented population. (Bell's Prin. 1164 ; M'Niel, Jan. 24, 1828, 6 S. 422 ; Lynedoch, May 14, 1828, 6 S. 791 ; E. of Glasgow, 1834, 7 W. S. 185 ; M'Leod, 1830, 8 S. 475.)

1266. In rebuilding a church, accommodation must be provided for the parishioners, and the rule is to provide for two-thirds of all examinable persons, or persons above ten years of age, in the parish. (Ibid. ; Ibid.)

1267. *The Manse.*—The minister has also a claim against the heritors for a manse, whether the parish be wholly landward, or partly town or burgh and partly landward ; but the minister of a parish in a royal burgh is not entitled to a manse, under the Act 1663. If a minister entitled to a manse cannot be provided with one, compensation is given, under 5 Geo. IV., c. 72, sec. 2. (Stair, ii. 3. 40, More's notes, clxx. ; Ersk. ii. 10. 55 ; Bell's Prin. 1165 ; Auld, June 13, 1827, 2 W. S. 600 ; Blaikie, March 8, 1827, 5 S. 546.)

1268. *The Glebe.*—Every minister of a country parish is entitled to a glebe of four acres of arable land, or sixteen souns of pasturage. He is also entitled to grass for a horse and two cows. (Stair, ii. 3. 40, More's notes, clxxii. ; Ersk. ii. 10. 59 ; Bell's Prin. 1172 ; Anderson, 1664, M. 5121 ; Fullarton, 1779, M. 5123 ; Mackenzie, July 5, 1825.)

1269. If there are no church lands, the glebe is designed out of temporal lands ; the heritor whose lands are designed having

recourse against the other heritors. The presbytery possess the power of designing the glebe. (Stair, *idem.*; Ersk. ii. 10. 59 and 60; Bell's Prin. 1176 and 1773; Kingsbarns, 1794, M. 5140; see Laidlaw, Dec. 2, 1800, F. C.)

1270. The incumbent cannot alienate (1572, c. 48), but may fen the glebe, if he can obtain the sanction of the Court of Teinds. (Ersk. ii. 10. 61; *Infra*, Teind Court.) Upon the transportation of the church to a new locality, the Court have authorized a sale or excambion of the glebe. Excambions of glebes must be sanctioned by the presbytery.

1271. The minerals of a glebe are worked at sight of the heritors and presbytery, and the proceeds are placed under their management for behoof of the incumbent. Trees growing on the glebe are thought to belong to the minister. (Heritors of Keith v. Humbie, Feb. 16, 1791.)

1272. *Schoolmaster*.—The payment of the salary of the parochial schoolmaster, and the maintenance of the schoolroom and schoolhouse, are likewise permanent burdens on the heritors of the parish.

1273. It was enacted by 1696, c. 26, that where no parochial school had been before established, the heritors should provide a schoolhouse, and modify a salary to the schoolmaster, to be proportioned according to the valued rent of the parish; and 43 Geo. III., c. 54, provided that in all schools for parishes not entirely within burghs the salaries of the schoolmaster, which the original Act had fixed at 100 to 200 merks Scots, should be from 300 to 400 merks. Every twenty-five years after that date, the heritors and minister were to modify a new salary, according to the average price of oat meal, of the value of from one and a half to two chalders. The inadequacy of this provision has of late been universally admitted, and further legislation on the subject frequently attempted. The choice of the schoolmaster is vested in the minister and heritors, and the

person elected must be found qualified by the presbytery as to morals, religion, and literature. (*Infra*, Presbytery.)

1274. *Pigeon-Houses*.—In consequence of the destruction caused to the crops of neighbouring proprietors by pigeons, it was enacted by a Scottish statute, which is still in force (1617, c. 19), that no person shall in future be entitled to build a *doucot* (dovecot) upon any lands, either within burgh or in the country, unless he have lands and teinds extending in yearly rent to ten chalders victual, lying within two miles of it, nor to build more than one within the said bounds. Where lands have been purchased with an old dovecot, it is presumed, in the absence of proof to the contrary, to have existed before 1617, and may consequently be kept up by a proprietor though not possessed of the requisite amount of property, though it cannot be rebuilt by him. (*Kinloch v. Wilson*, Jan. 19, 1731.) It has likewise been decided that an heritor is entitled to build a pigeon-house for every ten chalders of rental which he possesses. (*Brodie*, July 3, 1752, M. 3602.)

1275. Previous to the passing of the statute above referred to, there had been much legislation for the protection of pigeons; and “the taking of them without the permission of the owner, in general, constitutes an act of theft.” (*Irvine*, Game Laws, p. 18.) The taking of young pigeons, more particularly, would certainly be so treated. (*Hume*, p. 80.) A tenant will not be entitled to shoot his landlord’s pigeons because they are devouring his grain, and the landlord refuses to herd them. (*Easton*, May 18, 1832; *Irvine*, p. 19.)

1276. *Game* (see *ante*, p. 230).—On the subject of the Game Laws, the reader is referred to Mr Irvine’s brief but exhaustive treatise.



## CHAPTER IV.

### PREScription.

1277. A distinction is now very commonly made by legal writers between *Prescription* and what, after the English fashion, we are in the habit of calling *Limitation*;<sup>1</sup> the former acting as a total extinction of a right, debt, or obligation by the lapse of time, whilst the latter merely renders certain forms of written acknowledgment incompetent as grounds of action or of summary diligence, without extinguishing the debt, or preventing its existence from being established by other proof. But both, in a general way, may be regarded as modes of extinguishing obligations by the lapse of time; and, in a practical work like the present, the most convenient course will be to treat them together.

1278. Prescription is further divided into *positive* and *negative*, because it is said to be a mode of acquiring property as well as losing it. In the former sense, however, it simply amounts to a mode of securing property by preventing the title of its holder from being called in question, after a certain number of years. (Ersk. iii. 7. 1; Bell's Prin. 606; Napier, p. 2.) No original title can ever be created by prescription; the statute by which the so-called positive prescription was introduced (1617, c. 12) expressly declaring that the lands which it secures from challenge after forty years, shall be lands possessed "by virtue of heritable infestments."

1279. *Forty Years' Prescription*.—What is commonly known

<sup>1</sup> Limitation, except as applied in a different and literal sense to cautionary obligations, is not properly a Scots law term. It is an English phrase, like *lien*; which the works of the late Professor Bell were mainly instrumental in introducing amongst us.

as the long negative prescription was introduced into our law so early as the reign of James III. (1469, c. 28, and 1474, c. 54). By the second of these enactments, the object of which is to explain the first, it is ordained that all old obligations made before, that is, older than, the date of forty years, shall be prescribed, and of no strength; and, likewise, in time to come, all obligations made, or to be made, that are not followed within forty years, shall prescribe and be of none avail. (Stair, ii. 12. 12; Ersk. iii. 7. 8; Bell's Prin. 607; Napier, p. 34.)

1280. These Acts were at first confined to simple obligations, but were soon extended to mutual contracts of all kinds, including marriage-contracts, and to all cases of debt created by bond. The long negative prescription will even extinguish the right to challenge the validity of a deed relating to heritable property, provided the challenge be on grounds extrinsic to the terms of the deed. The right of reducing a deed on the ground that it was granted on deathbed, will thus be lost, if not exercised within forty years. (Stair, ii. 12. 12; Ersk. iii. 7. 8; Bell's Prin. 608; Napier, p. 37.)

1281. No statute was required to establish a positive prescription in moveables, for the property of moveables is presumed from possession alone, without any written title; and the proprietor neglecting for forty years to claim them, cut off his right of action for their recovery, and thus effectually secured the possessor. (Ersk. iii. 7. 7.)

1282. The long positive prescription was introduced by stat. 1617, c. 12, in order to secure heritage possessed for forty years. It proceeds on the preamble that great inconveniences had arisen from the loss of titles and the dangers of forgery, after the means of improbation are lost by the lapse of time, and the numerous lawsuits which are thus engendered; and enacts, that whatever heritages the lieges have possessed by themselves or others for forty years, continually and together, from the date

of their infeftments without lawful interruption, shall remain in their peaceable possession, and that they shall not be inquieted in the right of property by their superiors or others pretending right to the same by virtue of prior infeftments. (Stair, ii. 12. 15; Ersk. iii. 7. 3; Bell's Prin. 2002; Napier, 49.)

1283. If the possession be proved as far back as memory can reach, it will be presumed to have existed from the date of the title on which it is founded. (Ersk. iii. 7. 3; Borthwick, June 13, 1677, 2 B. S. 215.)

1284. The long prescriptions, both negative and positive, may be interrupted. This may take place,—1<sup>st</sup>, Judicially, that is, by an action raised in Court before the expiry of the forty years; 2<sup>d</sup>, By a notarial instrument; 3<sup>d</sup>, In the case of the negative prescription, by a new document or acknowledgment of the debt or liability, or by a partial payment to account, or payment of interest, where that can be clearly referred to the debt in question. From the moment of interruption a new course of prescription commences to run. (Stair, ii. 12. 26, and More's Notes cclxvii.; Ersk. iii. 7. 38 and 39; Bell's Prin. 615, *et seq.*, and 2007; Napier, ii. 656.)

1285. Prescriptions can be interrupted only by the act of the person against whose claim it is running (Ersk. iii. 7. 41; Baillie, March 2, 1790); but it may be *suspended* by his inability to act, in consequence of minority, insanity, or the like. In this case the period of prescription does not recommence as in the case of interruption, but the time during which it is suspended is simply reckoned off. (Stair, ii. 12. 10 and 27; Ersk. iii. 7. 37 and 45; Bell's Prin. 625, *et seq.*, and 2022 and 2023.)

1286. It is provided by 1669, c. 10, that “all citations which shall be made use of for interruptions, whether in real or personal rights, be renewed every seven years; otherwise to prescribe, except the parties be minors.” Citations are here opposed to actions, in which the parties have appeared in Court,

which continue in force for forty years. (Ersk. iii. 7. 43; Bell's Prin. 618; Napier, 661 and 854; Camerons, 1761, M. 11331.)

*Of the Lesser Prescriptions.*

1287. These possess the character which we have described as belonging to those which have recently been termed limitations. Their object is, generally, to protect parties against the effects of their own negligence in preserving vouchers, or their natural obliviousness of small transactions, by transferring the burthen of proof to the claimant who has neglected to recover till after a stated period has elapsed, and by restricting its character. Whilst the long prescriptions extinguish the claim notwithstanding any offer of proof that it is still undischarged, the shorter prescriptions are liable to be elided by the writ or oath of the debtor.

1288. *Vicennial Prescription.*—By 1617, c. 13, the original Act, 1449, c. 57, was so modified as to permit the lawful heir to an heritable estate to bring an action for setting aside an erroneous retour of service at any time within twenty years of its date. The statute 10 and 11 Vict., c. 47, sec. 13, has substituted an extract decree by the Sheriff of Chancery for the former retour (*ante*, p. 155); and as nothing special is provided on the subject in the statute, the extract, like the retour, probably falls under the vicennial prescription. (Ersk. iii. 7. 19; Bell's Prin. 2024; Napier, 857.)

1289. *Holograph Writings.*—By 1669, c. 9, it is provided that holograph missive letters, and holograph bonds, and subscriptions in account books, without witnesses, if not sued for within twenty years, shall prescribe, “except the pursuer offer to prove by the defender's oath the verity of the said holograph bonds, and letters, and subscriptions.” If the writing is thus proved to be holograph and the subscriptions genuine, the obligation contained in the deed will be effectual unless the debtor can prove that it has been discharged. It is expressly declared

that this prescription shall not run against minors. (Stair, ii. 12. 35, More's Notes, p. cclxv.; Ersk. iii. 7. 26; Bell's Prin. 590; Napier, 866.)

1290. *Of Crimes*.—If no steps have been taken to bring an offender to trial, and if no sentence of fugitation has been pronounced within twenty years after the commission of the crime, the right to prosecute prescribes. (Ersk. iv. 4. 109; Napier, 867; Hume's Com., vol. ii., p. 136.) (As to Treason, *infra*, 226.)

1291. *Decennial Prescription*.—By 1696, c. 9, it is declared that, on the one hand, no action shall be competent to minors against their tutors or curators; or, on the other, to them against the minor, if not prosecuted within ten years after the expiry of the office. (Ersk. iii. 7. 25; Bell's, Prin. 635; Napier, 854.) But in the case of factors, tutors, and curators, under the Pupils Protection Act (12 and 13 Vict., c. 12), it is provided (sec. 34), that if they shall have been discharged by a judgment of the Court, such discharge shall be final against all parties, though pronounced in absence, provided the same shall not be opened up as a decree in absence in the Court of Session, within the time limited for appealing to the House of Lords, or shall not be appealed from within that time.

1292. *Septennial Prescription*. Cautionary Obligations.—The Act 1695, c. 5, on the preamble that "great hurt and prejudice hath befallen many persons and families, and oftentimes their utter ruin and undoing been caused by men's facility to engage as cautioners for others," provides that no man so binding himself thereafter, for and with another conjunctly and severally, in any bond or contract for sums of money, shall be bound for the said sums for longer than seven years after the date of the bond. It is further provided, that not only those who are bound expressly as cautioners, but whoever is bound with another as principal or co-principal, shall have the benefit of the Act, if he has either a claim of relief in the bond, or a separate bond of

relief, intimated to the creditor at receiving the bond. This intimation must be understood as a formal and regular intimation made to the creditor. (Stair, More's Notes cxv.; Ersk. iii. 7. 22-24; Bell's Prin. 600-604; Napier, 850.) "This Act," says Mr Erskine, "being correctory of our former law, hath received a most limited application" (Erskine, Ivory's ed., p. 769); and judicial cautioners, cautioners for the faithful discharge of an office, etc., do not fall under it.

1293. *Sexennial Prescription*.—By 12 Geo. III., c. 72, sec. 37, rendered perpetual by 23 Geo. III., c. 18, sec. 55, it is enacted "that no bill of exchange, or inland bill, or promissory note, executed after 15th May 1772, shall be of force or effectual to produce any diligence or action in Scotland, unless such diligence shall be raised and executed, or action commenced thereon, within the space of six years from and after the terms at which the sums in the said bills or notes become exigible." (Ersk. iii. 7. 29, note, Ivory's ed.; Bell's Prin. 594; Napier, 823.)

1294. Bank notes are excepted from the provisions of the statute; and as regards bills and promissory notes, it is provided that, after the expiration of the six years, it shall be lawful to prove the debts which they contain to be resting owing by the writs or oaths of the debtor. (Sec. 39.)

1295. The minority of the creditors must be deducted from the six years. (Sec. 40.)

1296. *Quinquennial Prescription*.—The following prescriptions were introduced by 1669, c. 9:—Arrears of rent from agricultural subjects prescribe in five years from the date of the tenant's removal from the lands; ministers' stipends and multures prescribe in five years after they become due. (Ersk. iii. 7. 20; More's Notes to Stair, p. cclxxiv.; Bell's Prin. 634; Napier, 818.)

1297. All consensual contracts to the constitution of which writing is not necessary, and which may be proved by witnesses, and all bargains concerning moveables, prescribe within five

years; that is to say, that after the expiry of that time they can be proved only by the writ or oath of the party. (Ersk. idem; Napier, 813; Hunter, June 29, 1843, 5 D. 1285; Campbell, Jan. 15, 1848, 10 D. 361.)

1298. *The Triennial Prescription*.—One of the most important prescriptions in practice is that which has reference to shop accounts, servants' wages, etc. By 1579, c. 83, it is ordained that "all actions of debt for house-mailles (*i.e.*, rents where the lease is verbal), men's ordinaries, servants' fees, merchants' accounts, and other the like debts that are not founded on written obligations, be pursued within three years; otherwise the creditor shall have no action, except he either prove by writ or oath of his party." In the prescription of servants' wages each term runs a separate course. (Stair, More's notes, cclxxiv.; Ersk. iii. 7. 17; Bell's Prin. 629; Napier, 801.)

1299. Under "other the like debts," have been held to fall debts due to artificers for their work or wages, and accounts to writers, agents, surgeons, and the like. (Bell's Prin. 629; Napier, 808.)

1300. The prescription on an account current does not begin to run till the date of the last article in the account. (Ersk. iii. 7. 17; Napier, 766; Bell's Prin. 631; White v. Currie, Dec. 1839, 8 S. and D. 154.) In house rents, again, each year's rent runs a separate prescription. (Ersk. do.; Napier, 803; Cumming's Trs. v. Simpson, Feb. 18, 1825, 3 S. and D. 545.) Not only the constitution, but the subsistence of the debt must be proved, either by the defender's oath, or by a writing under his hand. (Ersk. iii. 7. 18; Napier, 784; 1 Bell's Com. 332; Bell's Prin. 632.) The fact of a partial payment having been made will not give rise to a presumption that the balance is outstanding, unless it has been made expressly as a payment to account. (Dickson on Evidence, p. 288.) "It has been sometimes argued that the words of the statute admitting and

requiring proof by the writ or oath of the party, implied the immediate debtor to be still in life. The expression of the statute is 'his party,' which cannot be construed to be simply the party contracting. It would be very unjust so to hold it, for it would exclude the creditor from the benefit of the writ or oath of the debtor's representative, who became by his representation debtor in the debt, and partly to the action. 'His party' plainly includes both the immediate debtor and the representative, where the action is brought against the representative, and thus the just construction is that which the statute in practice has received." (Lord Rutherford, in *Cullen v. Smeal*, July 12, 1858.)

1301. Numerous cases of the triennial prescription of shop accounts occur every day in the Small Debt Courts; and it is for the judge to say whether the statement made by the defender, which is seldom directly either negative or affirmative, does or does not amount to an admission of resting owing. If his statement be simply that he remembers nothing of the special debt in question, it does not amount to an admission of resting owing, and consequently will not support the claim. If he add that his habit is to settle such debts at the time, the statement will be still more clearly negative; but it does not follow that an admission of a contrary habit will suffice as a proof of resting owing: for the meaning of the rule is, that after the expiry of the three years the tradesman shall not only raise a presumption, but shall positively prove the subsistence of the debt, either out of the mouth or by the handwriting of the defender.

1302. A previous statute of the same year, 1579, c. 81, had applied the same prescription to actions of spoilzie and ejectment; and by c. 82 it is extended to actions of removing, which are ordained to be pursued within three years after the warning, otherwise a new warning must be given.

1303. By 1707, c. 6, actions for wrongous imprisonment pre-



scribe after three years, computed from the last day of imprisonment.

1304. By 7 Will. III., c. 8, sec. 5, high treason prescribes unless a true bill be found by a grand jury within three years. This statute applies to the three kingdoms.

1305. By 1 and 2 Vict., c. 114, sec. 22, it is provided that arrestments shall prescribe in three years instead of five; and that arrestments which shall be used upon a future or contingent debt, shall prescribe in three years from the time when the debt shall become due.

## CHAPTER V.

### OF THE CONTRACT OF LETTING AND HIRING.

1306. Location, or letting and hiring, is a contract between the proprietor of a subject, or lessor,—and the hirer, tenant, or lessee; whereby the former conveys to the latter a right to the temporary possession of the subject, and its fruits and profits, for a certain rent or periodical payment in money, grain, or services. (Stair, i. 15. 1; Ersk. iii. 8. 14; Bell's Prin. 188; 1 Bell's Com., 5th ed., 255.)

1307. The principles applicable to the contract of sale are, in general, applicable also to the contract of letting, which is in reality a sale of the temporary use of a certain subject. (Stair, *ibid.*; Ersk. *ibid.*; Bell's Prin. *ibid.*)

1308. When the subject is land, more especially if it be let for a considerable time, the contract is called a *lease* or *tack*; when it is a house or shop, for the ordinary period of one year, it is commonly called an *agreement*; and when services, an *engagement*. The latter branch of the subject has already been treated of under the head of Master and Servant. (*Ante*, p. 82.)

*Of the Agricultural Lease.*

1309. "The writ requisite to constitute a tack," says Lord Stair, "requireth not many solemnities; but if the thing set, the parties, the rent, and the time be clear, the tack will be valid." (Book ii., tit. ix., sec. 5.) Such are still the essentials of all leases.

1310. *Verbal Lease*.—A lease of land cannot be proved by ordinary parole evidence if for more than one year, and a verbal lease entered on for a longer period will not be effectual even for that period. But verbal leases for terms of years have been sustained to the extent of *rei interventus* following on them. A verbal lease, in the absence of *rei interventus*, may be proved by the oath of the party calling it in question. (Stair, ii. 9. 4, and More's notes, ccxlv.; Ersk. ii. 6. 30; Bell's Prin. 1187, *et seq.*; Hunter, Landlord and Tenant, i. 349; M'Rory, Dec. 1810 F. C.)

1311. *Written Lease*.—A formal lease must be written on stamped paper, and regularly authenticated as a probative deed. (Stair, More's notes, ccxlv.; Ersk. ii. 6. 24; Bell's Prin. 1190; Hunter, i. 357; M'Niven, March 10, 1836, 14 D. 685; Hutchison, March, 4, 1837, 13 D. 837; Forsyth, December 13, 1853, 16 D. 197.)

1312. But where one or even both of these requirements are wanting, it does not follow that the lease may not be rendered effectual; for the stamp may be adhibited at any time on payment of certain penalties, and the want of authentication may be supplied by *rei interventus*, or *homologation*. (Stair, More's notes, ccxlv. (Ivory's ed., note 96), and iii. 3. 47; Bell's Prin. 1192.) (*Ante*, p. 178.)

1313. A lease may be in the form of a mere offer, if followed by evidence of acceptance (Bell's Prin. 1190; Cairns, June 18, 1833, 11 S. D. 737; Russel, May 14, 1835, 13 S. D. 752;

Burnet, Nov. 27, 1835, 14 S. D. 74); or it may consist of general regulations for the letting and management of an estate, proved to have been accepted by the parties (Bell's Prin. 1190; M'Cra, June 7, 1828, 6 S. D. 935); or it may be simply a written obligation to grant a lease (Garioch, Feb. 8, 1750, M. 15177; Grant, July 10, 1788, M. 15180).

1314. By a very enlightened enactment, so early as the reign of James I., leases in Scotland were rendered effectual, not only against the granter and his heirs, but against purchasers or other singular successors. "It is ordained," 1449, c. 18, "for the safetie and favour of the puir people that labouris the ground, that they and all utheris that hes taken, or sall take, landes in time to come fra Lordes, and hes termes and yeires thereof; that suppose the Lordes sell or annaly (alienate) that land or landes, the takers (tack-holders) sall remaine with their tackes, unto the isschew of their termes, qhais handes that ever thay landes cum to, for sik like mail as they took them for." This statute, which we have given in full, is interesting when viewed in connection with contemporary legislation on the same subject in other countries, and the high relative position in agriculture which Scotland has now attained.

1315. In order to bring a lease within the provisions of the statute, it must have a definite rent and a definite term. (Stair, ii. 9. 26 and 29; Ersk. ii. 6. 24; Bell's Prin. 1194; Hunter, i. 429; Hamilton, 1626, M. 15188; Oswald, 1688, M. 15194; Redpath, Nov. 22, 1737, M. 15196.)

1316. A lease to endure "whilst grass groweth up and water runneth down," will be effectual against the granter and his heirs, but not against singular successors. (Ersk. ii. 6. 24; Bell on Leases, i. 44; Bell's Prin. 1194; Kerr and Waugh, 1752, M. 10307; Fraser, 1758, M. 13196; Irvine, 1760, M. 15199.) But such a lease will be effectual against a purchaser also, if he has either been made aware of its nature, and accepted it as part

of the bargain, or if he homologates it by his conduct after purchasing the estate (Wight, 1763, M. 15199; Scott, 1771, M. 15200); and leases for any number of years that shall be stipulated are similarly protected, if registered under the provisions of the recent statute, 20 and 21 Vict., c. 26, such registration being prior to the completion of the purchaser's title.

1317. The ancient statute referred to will not cover leases for a period greatly beyond that for which, according to the custom of the country, they are commonly granted, even though the period should be definite. A lease for 400 years is invalid (Alison, 3d Feb. 1730, M. 15196; Jordanhill, Feb. 13, 1752, M. 10307); but an agricultural lease, if granted expressly for purposes of improvement, will be good though it exceed very considerably the customary period of nineteen years. On the same principle, building leases, and, above all, mining leases, will be sustained for periods of any reasonable duration, so long as no attempt is made to create estates in perpetuity by means of lease. This restriction the recent statute, to be presently referred to, has removed, perhaps inadvertently. Liferent leases are effectual. (Bell's Prin. 1195.)

1318. Though the terms of the statute 1449 limit it to lands, it has been held to apply, not only to minerals, but to mills, fishings, and the like, on the ground that these are annexed to land—*fundo annexa*. The rule by which objects have been included under, and excluded from, the statute has hitherto been an extremely arbitrary one. For example, a lease of salmon-fishing is protected, whilst a lease of shooting is not. (Stair, ii. 9. 2; Ersk. ii. 6. 27; Bell's Prin. 1207; Hunter, i. 435; Bell on Leases, i. 31–33; Pollock, 5th June 1828, 6 S. 913.)

1319. The recent Act, 20 and 21 Vict., c. 26 (10th August 1857), "to provide for the registration of long leases and assignation thereof," has introduced what may very readily be converted into a new title to lands in perpetuity. It enacts that it

shall be lawful to record in the register of sasines, or, if the lands are held burgage, in the burgh register, probative leases, whether executed before or after the passing of the Act, for a period of thirty-one years, or *for any greater number of years that shall be stipulated*. (Sec 1.) Leases containing an obligation to renew from time to time, at fixed periods, or on the termination of a life or lives, or otherwise, are declared to be leases under the Act, provided they shall be renewable so as to last for thirty-one years or upwards. Such leases, so recorded, shall be effectual against singular successors in the lands whose infestment is posterior to the date of registration. The Act is merely permissive, and it is provided that all leases which would, under the existing law, have been valid and effectual against singular successors, shall still be valid, though not recorded. (Sec. 2.) Recorded leases may be assigned, and the recording of such assignation shall vest the assignee with the right of the granter; but such assignation shall be without prejudice to the right of hypothec or other rights of the landlord. (Sec. 3.) Provisions are also made for recording assignations in security, for their translation from one party to another, for the case in which the party presenting for registration is not the original lessee or assignee, etc. (Secs. 4, 5, and 6.) Sec. 16 declares that registration shall, in all cases, be equivalent to possession; to the effect of establishing a preference in favour of the grantee; and sec. 17 provides that no lease executed after the date of the Act, shall be registerable where the name of the lands and their boundaries are not given, or where they exceed fifty acres in extent.

1320. *Granter's Title*.—Generally, whoever is capable of contracting may grant a lease. (Stair, ii. 9. 3; Ersk. ii. 6. 21; Bell's Prin. 1180; Hunter, i. 75.)

1321. In the case of heritable subjects, however, it is necessary that the lessor's title should be completed by infestment, or by the forms which the recent statutes have established for in-

feftment and sasine ; otherwise the lease, though effectual against the granter or his heir, and not questionable at the instance of the lessee, may be invalidated by a singular successor duly entered. (Ersk. ii. 6. 21 ; Bell's Prin. 1181 ; Hunter, i. 81.)

1322. A lease granted by a husband over his own lands will be effectual against his widow, though it should apply to lands over which her terce extends, or which have been set apart to her by a locality. (Fraser, i. 801 ; Hunter, i. 118 ; Moray v. Stewart, M. 4392.)

1323. Leases of the wife's estate, granted by the husband even without her consent, will be valid during the husband's life. (Bell's Prin. 1594 ; Grieve, June 18, 1797, M. 5951 ; Gibson v. Aitken, 12th June 1789 ; Hume's Decisions, 205 ; see Hume, 1734, M. 15700.)

1324. A tutor is not entitled, without the authority of the Court, to grant a lease to endure beyond the period of his office. (Stair, ii. 9. 3, and More's notes, xxxviii. ; Ersk. i. 7. 16 ; Hunter, i. 159 ; Bell's Prin. 1184, 2084 ; Ross, March 9, 1820, F. C. M. 14981 ; Hallows, 1794.)

1325. A lease granted by a minor, with the consent of his curator, is effectual, unless reduced on the ground of lesion. (Stair, i. 6. 44 ; Ersk. i. 7. 33 ; Hunter, i. 161 ; Fraser, ii. 175.) (*Ante*, 66 and 71.)

1326. A lease granted on deathbed to the prejudice of the heir will be reducible, if for an extraordinary period, or for an inadequate rent, but not where it is an ordinary act of administration. (Ersk. iii. 8. 37 ; Bell's Prin. 1182 and 1801 ; Hunter, i. 78 ; Christison, 1735, M. 3226 ; Boyle, 1739, M. 3235 ; Semple, June 1, 1813, F. C.)

1327. A proprietor who has granted an heritable bond is not thereby deprived of the rights of property, and may consequently grant a valid lease ; but if legal diligence has commenced on the bond, or bankruptcy or sequestration have ensued, leases subse-

quently granted will be subject to challenge. A voluntary or judicial trust will transfer the power of leasing from the proprietor to the trustees. (Bell's Prin. 1185; Hunter, ii. 533, *et seq.*)

1328. The powers of a proprietor are frequently limited by the terms of an entail; but unless the limitations be express, an heir of entail in possession is in the same position as any other proprietor. (Ersk. iii. 8. 29; Bell's Prin. 1752; 1 Bell's Com. 68; Hunter, i. 83; Bell on Leases, 126, note.)

1329. A liferenter can grant a lease only for his own lifetime. In order to secure the tenant of a liferenter in possession for the full agricultural period, the fiar must concur in granting the lease. But the executors of the possessor of an estate in tailzie or in liferent are liable in damages, if the possessor grant a lease beyond his powers, and the lessee be evicted at his death. (Ersk. ii. 9. 57; 1 Bell's Com. 62; Bell's Prin. 1057 and 1181; Hunter, i. 118, and ii. 155; Fraser, 1794, M. 8256 and 7849.)

1330. *Powers which the Granter is presumed to reserve.*—Unless there be stipulation to the contrary, the right to the following objects will be held not to be included in an agricultural lease:—

1331. (1.) *Mines and Minerals*, and the power of searching for them, working them, and constructing roads for that purpose on payment of surface damage. (Stair, ii. 9. 31; Ersk. ii. 6. 22; Bell's Prin. 1226; Hunter, ii. 196.)

1332. (2.) *Trees and Wood*; the tenant having a right merely to the annual fruits of the soil. He is thus entitled to cut young willows as a crop, but not willow trees. (Ersk. ii. 6. 22; Bell's Prin. 1226; Hunter, ii. 197; Touch, 1664, M. 15252; Bogue, 1806, M. Planting Ap. 2.)

1333. The statute 1698, c. 16, "for preserving of planting," has been held to include fruit-trees, but not natural woods, which are not of such value as to be worth preserving for sale, and wherein cattle are in use to be pastured. (Ferguson, 1734, M. 10479; Robertson, 1744, M. 10484.)

1334. The tenant is liable for his family and servants; and if an injury be done during the currency of his lease, it will be held to be done by some one for whom he is responsible, unless he prove the contrary. (Robertson and Fergusson, *ut supra*; Logan, 1775, M. 10492.)

1335. (3.) *Kelp*.—The right of cutting sea-ware and manufacturing kelp, formerly of great value, is not conveyed to the tenant even by a lease which gives him “the parts, pendicles, and universal pertinents of the farm.” The reverse might be the case, however, were a local custom proved, or the intention of the parties otherwise shown to have been to the opposite effect. (Bell’s Prin. 1226; Campbell, June 2, 1795, M. 9646; Hunter, ii. 199.)

1336. (4.) *The right of Hunting and Shooting*.—The right of exercising field sports of every description is held to be reserved by the landlord, subject to liability for damage. (Bell’s Prin. 1226; Hunter, i. 319, and cases cited; Ronaldson, Nov. 21, 1804, M. 15270.)

1337. The tenant has no right to kill game without permission from the landlord (Bell’s Prin. 953; Marquis of Tweeddale, June 18, 1808, F. C.; Earl of Hopetoun, Jan. 17, 1810, F. C.; Ronaldson, *antea*; Wemyss, 2d Dec. 1847, 10 D. 194; 6 Bell, House of Lords, 394); but it has been found, that he may be entitled to damages against the landlord, on the ground of the latter having increased the game on the farm beyond a fair average stock (Wemyss v. Erskine, Dec. 2, 1847). Whether the tenant can obtain an interdict against the landlord increasing the game beyond the average quantity when he took the farm, is still a question. (See Wemyss v. Gulland, 2d Dec. 1847.)

1338. The tenant is not entitled to scare the game away by discharging fire-arms loaded with blank-cartridge, or by hunting them with muzzled dogs. (Wemyss, *supra*, per Lord Justice-General.)



1339. Rabbits are not game; and a tenant is entitled, without consent of his landlord, to kill them for the protection of his crops. (Hunter, ii. 183; Moncrieff, 13th Feb. 1828.)

1340. On the same principle he will be entitled to kill wood pigeons, probably wild ducks, and all other animals not game; and certainly vermin, foxes included. (Hunter, *ut supra*; Colquhoun, 6th Aug. 1785, M. 4997.) Hares, though game, may now be killed on one's own land without a game certificate. (11 and 12 Vict., c. 30.)

1341. A tenant is not entitled to kill tame pigeons belonging to his landlord, or to any one entitled to keep them in the neighbourhood; but he may scare them away. (Easton, 18th May 1832, 10 S. 542.) (*Ante*, p. 217.)

1342. A tenant cannot fish for trout in a river flowing through his farm; and if he do so without permission, he is liable to the penalties of contravening the Act 8 and 9 Vict., c. 26. (Duke of Richmond *v.* Dempster, Feb. 1861.)

1343. *Right of passing over the Farm.*—The landlord is entitled at all times to walk or ride over a farm let for agricultural purposes, provided the tenant's crops are not thereby injured. But the proprietor of a house, with a garden and shrubbery attached, has not, during the occupancy of the tenant, a right of access to the shrubbery in order to prune the plants, dress the ground, and repair the fences. (Baxter *v.* Paterson, May 26, 1843.)

1344. *Destination of the Lease.*—It is commonly settled by the convention of the parties to whom the lease shall go, failing the original tenant. If there be no stipulation on the point, and the lease is given to the tenant simply by name, it will go to his heirs in heritage. (Bell's Prin. 1219; Stair, More's notes, ccxlviii.; Hunter, i. 210.) If given to two persons, as joint tenants, the interest of one of them dying before the expiry of the lease, will go to his heirs, and not to the other tenant. (Dickson, July 10, 1825, 2 S. 413; Macalister, 22d Feb. 1859,

21 D. 560.) Where the lease is to two and the longest liver, and their heirs, on the death of one, his heir has no right during the lifetime of the other.

1345. *Transmission of the Lease.*—A power of assigning or subletting is not implied in an ordinary agricultural lease (Ersk. ii. 6. 31, 32 ; 1 Bell's Com. 75, 76 ; Hunter, i. 226 ; Bell's Prin. 1216) ; and, unless under the provisions of 20 and 21 Vict., c. 26, can consequently be exercised only where it is expressly given.

1346. Where an agricultural lease exceeds nineteen years, or where it is granted for a lifetime, the converse is the rule,—the power of subletting and assigning being implied unless expressly excluded. (Hunter, i. 230.)

1347. Where a sub-lease is given, the original tenant remains bound. (Ersk. ii. 6. 33 and 34 ; Hunter, i. 226 ; Geo. Ronaldson, Pet., 18th Dec. 1812, F. C.)

1348. *Inevitable Damage.*—Where, from the effects of inundation, from being overblown with sand, from the devastation of a foreign enemy, or other inevitable accident, the land does not yield a crop sufficient to pay for seed and labour, no rent is payable to the landlord. The landlord, however, is not bound to indemnify the tenant for the seed and labour which he may have expended. Unless the accident can be shown to have arisen from the fault of the one or the other, the landlord loses his rent, and the tenant his seed and labour. (Stair, i. 15. 2 and 3 ; Ersk. ii. 6. 41 ; Bell's Prin. 1208 ; Bell on Leases, 293 ; Hunter, ii. 423.)

#### *Conditions of the Lease.*

1349. Warrantice on the landlord's part is implied in every lease, to the effect that the tenant shall have undisturbed possession, and shall be protected against all encroachments. (Ersk. ii. 6. 39 ; Bell's Prin. 1253 ; Bell on Leases, 226 ; Hunter, ii. 250.)

1350. On the tenant's part, there is an implied obligation to

stock the farm adequately, to labour it according to good husbandry, to pay his rent regularly, to keep and leave the houses and enclosures in repair, and to remove at the expiration of the lease. (Ersk. ii. 6. 39; Bell's Prin. 1222; Bell on Leases, 230; Dudgeon, 23d Nov. 1813; Thomson, 12th Nov. 1824, 3 S. D. 275; Horn, Jan. 10, 1830, 8 S. D. 329.)

1351. *Removing Fixtures*.—Articles so attached to land, either by being built upon it or fixed in to it, as not to admit of being removed without deteriorating the subject itself, and destroying the completeness of the premises from which it is detached, must be left by the tenant without compensation on the expiry of the lease. In the eye of the law, such subjects become heritable by accession, according to the maxim *inædificatum solo, cedit solo*. (Ersk. ii. 6. 39, and note, Ivory's ed., p. 372; 1 Bell's Com. 752; Bell's Prin. 1255; Hunter, i. 284; Fisher v. Dixon, 6th March 1843; House of Lords, 26th June 1845.)

1352. The difficulty is always to determine to what subjects this character belongs; and it is consequently of importance to note the points that have been established. These in Scotland have been fewer than might be expected, in consequence of the care with which they are usually provided for by positive agreement.

1353. The general rule is, that tenants cannot remove buildings erected for their own use; but the tenant is not bound to put such houses in repair: it is sufficient if he leave them in the condition in which he was using them for his own purposes when he quitted the farm. (Ersk. ii. 6. 39 (Note 119); Hunter, i. 300; Thomson, 8th Feb. 1822, 1 S. 340.)

1354. Where a tenant has erected a thrashing mill he will be entitled to remove the machinery, but not the building. If he has received a sum of money for the purpose of erecting such a mill, however, the machinery will be held to be included. (Ersk. ii. 2. 4, Note 20, Ivory's ed.; Bell's Com. 752; Hyslop, Jan. 11, 1811; Campbell, 22d Feb. 1825.)

1355. Trevisses, racks, and mangers, put up in a cottage temporarily used as a stable, may be removed by the tenant without paying damages to the landlord. But the Court thought "if the trevisses had been permanent fixtures, the case might have been different." (Scott, 1st Dec. 1824, 3 S. 344.)

1356. The subject has been much more frequently discussed in England; and as the laws of the two countries do not differ essentially on this point, it may be desirable to mention a few of the leading points which have been ruled.

1357. A beast-house, carpenter's shop, fuel-house, cart-house, pump-house, and fold-yard wall built of brick and mortar, tiled, and let into the ground, erected at the tenant's own expense, could not be removed even during the term of the lease, and though the premises were thereby left in a state in which he entered them. (Elwes v. Maw, 3 East. R. 38; Hunter, i. 291; Woodfall, 325 and 330.) A tenant put a barn upon pattens and blocks of timber, *lying* on the ground; and on proof that it was customary to do so in the particular part of the country, in order to carry them away, a verdict was given for the lessee. (Culling v. Tuffnal, at Hereford, 1694, Rule Nisi Prius, 34.) It is said that the same result would now follow without any proof of local custom; the tendency of the later decisions having been to relax the former law of fixtures in favour of the tenant. A windmill of wood had a brick foundation; but the wood was not let into the brick, but pressed on it with its weight merely:—it was found that the mill might be removed; and a similar decision was arrived at with reference to a barn similarly constructed. (Rex v. Otley, 1 Barn. and Adol. 161.)

1358. There are *dicta* in England, to the effect that gardeners may remove hot-houses and other erections for horticultural purposes; and it is decided that nurserymen may remove trees and plants. But if a private person, or one who occupies land as a farmer, raises young trees for the purpose of planting his orchard,

he is not entitled to sell or remove them at the end of his term. So a tenant, not a gardener, cannot remove a border of box planted by himself, unless by special agreement with the landlord. (Hunter, i. 293.)

1359. *Fences* erected by the tenant cannot be removed, but the tenant is not bound to leave them in repair. (Hunter, vol. ii., p. 207 ; Bell's Prin., sec. 1254.)

1360. The simple rule in all such cases would seem to be, that the tenant should be permitted to remove his fixtures, on condition that he either restored the ground to its original condition, or paid damages occasioned by his failing to do so ; and that the landlord, if he thought proper, should be entitled to insist on their removal, and to claim either that the ground be left uninjured, or that damages be paid him for the injury.

1361. *Mode of Cropping*.—It is not unusual to prescribe a mode of cropping more specific than that which is implied in the condition, that it shall be conform to the rules of good husbandry, and to fix a sum which shall be payable as additional rent, if the management shall be altered. But the most approved course is to prohibit an injurious rotation, or to prescribe one simply for the termination of the lease, leaving the choice during the rest of it to the judgment of the tenant. (Forms of the agricultural lease as used in East Lothian and Berwickshire, containing the rotation clauses above referred to, will be found in the Juridical Styles, vol. i., p. 689, 694.)

1362. *Removing*.—After the stipulated period has expired, the tenant is entitled to remain in possession, on the ground of tacit relocation, till legally removed by the landlord. In order to warrant judicial removing, the tenant must be formally warned by the landlord to remove ; and the only effect of an express stipulation to remove in the lease seems to be to obviate the necessity for warning. The subject of removing was regulated by the statute 1555, c. 39, the complicated machinery

of which was simplified, first, by an Act of Sederunt, 1756, and latterly by the Sheriff Court Act, 16 and 17 Vict., c. 80, sec. 29.

1363. By the Act of Sederunt it was requisite that the action of removing should be called in the Sheriff Court forty days before the Whitsunday at which the lease expired; or, if it expired at a different term, forty days before the Whitsunday previous to that term. The action thus called was equivalent to warning under the statute; and the Sheriff having given decree in it, followed by a decree of ejection, the physical removal of the tenant might be effected *vi et armis*. "But it was found inconvenient that such notice should be brought forty days before Whitsunday, when perhaps the term of removal was Martinmas; and in order to remedy that inconvenience, the Act of Parliament was passed which placed the matter on a more reasonable footing, which gave the party notice by summons of removing forty days before the term at which he was actually to remove. That is now the law." (Lord President, in *Granger v. Geils*, July 16, 1857.)

1364. By subsequent clauses of the Sheriff Court Act, it is provided,—1st, That a lease containing an obligation to remove shall be equivalent to a decree of removing; and such lease, or an extract thereof, along with a written authority signed by the landlord, or his factor or agent, shall be a sufficient authority to a sheriff officer or messenger-at-arms to eject, provided forty days' notice has been previously given; and, 2d, That a letter of removal granted by the tenant, either holograph or attested by one witness, shall be equivalent to a decree of removing, and shall likewise be a warrant to an officer to eject, provided forty days' notice have been given.

1365. *Landlord's Hypothec*.—This is a security which the landlord possesses, *ex lege*, over the crop of each year for the rent of that year, and over the cattle and stocking of the farm

for the current year's rent. (Ersk. ii. 6. 56; Bell's Prin. 1236; Hunter, ii. 345.)

1366. (1.) *Crop*.—Each crop, so long as it exists and belongs to the tenant, is hypothecated to the landlord for the rent of the year of which it is the crop; and this claim continues though the landlord should not exercise his right for years. "Hypothec," says Lord Ivory (notes on Erskine, p. 387), "is not competent for the current rent over the produce of *another* year;" and he quotes from Mr Bell: "The produce of the farm is hypothecated for the rent of the year whereof it is the crop, and for *none else*; the right remaining to the landlord as long as the crop is extant." (Bell's Com. ii. 37, ed. 1826.) This right of the landlord takes precedence of all claims on the part of the creditors of the tenant, and the landlord is even entitled to vindicate the corn grown on the farm from a purchaser, unless sold in bulk in public market. (Ersk. ii. 6. 58; Bell's Prin. 1242; Hunter, ii. 368 and 376; Hay, 29th March 1639, M. 6219.)

1367. (2.) *Cattle and Stocking*.—There is no such right of vindication against the purchasers of stock, which differs also from the crop in this respect, that it is hypothecated only for the rent of the current year. Three months are allowed to the landlord for rendering his right effectual, after the last conventional term of payment. Where the cattle have been carried off by a poinding creditor, the landlord must thus bring his action against him within three months. (Ersk. ii. 6. 61; Bell's Prin. 1241; Hunter, ii. 365.)

1368. A tenant is not entitled to retain his rents, pending the lease, for illiquid claims of damages against his landlord for alleged violations of the stipulations of the lease. (Hunter, ii. 264; M'Rae v. M'Pherson, Dec. 19, 1843.)

*Renting of Houses, Shops, and other Subjects.*

1369. The principles which regulate agricultural contracts of

location are applicable, with a few exceptions, to the letting of urban subjects and manufactories.

1370. If, along with the house or shop, the use of furniture or machinery be let, the articles of which it consists are usually given over by inventory.

1371. Written leases of urban tenements are effectual against singular successors under the statute 1449, cap. 18. (Ersk. ii. 6. 27; Bell's Prin. 1273; Hunter, i. 436; Bell on Leases, i. 34; Weddel, 1794, M. 10309; MacArthur, 1804, M. 15181.)

1372. In an urban tenement the tenant is entitled to sublet and assign, unless specially prohibited, the reverse being the rule with reference to agricultural subjects. (Bell's Prin., secs. 1217, 1274; Hunter, ii. 252; Anderson, July 10, 1811, F. C.)

1373. A house let along with shootings, tolls, or other subjects, which do not fall under the statute, is nevertheless protected. (Hunter, i. 437.)

1374. *Repairs*.—The landlord is bound to deliver the house in a habitable condition, and to maintain it so during the currency of the term or lease. (Ersk. ii. 6. 43; Bell's Prin. 1253; Hunter, ii. 211.)

1375. The tenant is not entitled to compensation for money expended in ornamenting the house, or even in adding to its conveniency. (Hunter, ii. 211.)

1376. The tenant may claim the expense of repairs which he has made without the landlord's consent, provided they be necessary. (Ib., and Ersk. *ut. supra*; Hamilton, 1667, M. 10121; Deans, 1681, M. 10122.)

1377. If the landlord refuse to indemnify the tenant, the latter, if within a royal burgh, may apply to the Dean of Guild, whose warrant, proceeding on the estimate of tradesmen, is legal evidence both of the necessity and expense of the repairs effected. (Ib.)

1378. The landlord is entitled, on cause shown, to enter the



house for the purpose of inspecting its condition and effecting needful repairs. (Hunter, ii. 183.)

1379. The tenant must repair injuries occasioned by his own fault or negligence (Hunter, ii. 212; Hardie, March 3, 1768, M. 10133; M'Clelland, 1797, M. 10134); but if they arose from an inevitable or extraordinary cause, the burden falls on the landlord, even though by the lease or agreement the tenant is allowed a sum for preservation from decay and destruction from the ordinary effects of weather. (York Building Co., M. 10127; Hunter, ii. 212.)

1380. It is usual to make repairs and meliorations the subject of express agreement; and where a clause to this effect has been inserted in the lease, it will be binding on the heir, and, failing him, on the executors of the landlord, or on his singular successor. (Hunter, ii. 214 and 225.)

1381. *Vermin*.—A tenant may throw up the lease if the house has become uninhabitable from vermin; and if the nuisance is one which will not be easily cured, he is not bound to wait till an attempt to do away with it has been made. (Kippen v. Oppenheim, Dec. 13, 1847.)

1382. *Removing*.—Neither the statute nor the Act of Sederunt above referred to apply (*ante*, p. 277) to removings from burghal tenements, and formal warnings are consequently unnecessary.

1383. Timeous warning alone is requisite; and any intimation to quit, however informal, if acknowledged to have been received by the tenant *forty days* before the expiry of the lease or term of occupancy, will be sufficient even in burghs where the ancient form of chalking the door is observed. (Ersk. ii. 6. 47; Bell's Prin. 1278; Hunter, ii. 79; Riddel, Nov. 21, 1671, M. 13828; Bartoun, June 24, 1709, M. 13832.)

1384. In like manner, it is sufficient if the tenant give up his house forty days preceding Whitsunday, provided there be no lease or stipulation to the contrary, and this even in burghs in

which Whitsunday is not the usual term for letting houses. (Hunter, ii. 82 ; Jack, 1795, M. 13866.)

1385. *Country Houses*.—Formal warning is not necessary in country houses, unless there be land attached to them. (Hunter, ii. 54 and 83; Lunden, Dec. 19, 1758, M. 13845.)

1386. It was held not to be necessary in the case of two small houses, to which a garden of less than a quarter of an acre was attached, and which were held on a verbal lease for L.5. (Ersk. ii. 6. 47 (Ivory's note); Chirnside v. Park, March 8, 1843.) But unless the land be very insignificant, it will be advisable to give the regular warning prescribed by 16 and 17 Vict., c. 80. (*Ante*, 277.)

1387. *Landlord's Hypothec* extends, in houses and shops, over the goods and furniture; and as an agricultural tenant comes under an implied obligation to stock the farm, so an urban tenant is bound to furnish the premises which he occupies, and is liable to be removed if he fail to do so to the extent of affording security for the rent. "The hypothec, in urban tenements (like that over farm stocking), continues for three months after the term, within which period the landlord is entitled even 'to follow the property into the possession of another landlord, and there sequester the *invecta et illata* that had formerly been in the sequestering parties' house.'" (Ivory's Erskine, p. 392, note 151; Bell's Prin., sec. 1275; Hunter, ii. 353.)

1388. This right extends not only to furniture, but to books, paintings, plate, jewels, perhaps wines; but not to money, documents of debt, or wearing apparel. (Ersk. ii. 6. 64; 2 Bell's Com. 30 and 31; Bell's Prin. 1276; Countess of Callander, June 13, 1703, M. 6244.)

1389. The effects of travellers in an inn, or lodgers in a lodging-house, are not liable. (Ersk. ii. 6. 64 (note 151); Bell's Com. 31; Bell's Prin. 1276.)

1390. Furniture hired for permanent use is subject to the

hypothec. (Ersk. idem ; 2 Bell's Com. 30, note 6, and 31, note 2 ; Hunter, ii. 355 ; Bell's Prin. 1276 ; Pearson, June 6, 1820, F. C. ; Wilson, Dec. 17, 1813, F. C.)

1391. In shops and warehouses the hypothec extends over the goods for sale ; but as the tenant, for the purposes of his trade, must have an unlimited power of sale, the hypothec will not affect the right acquired by a *bona fide* purchaser. (Ersk. ii. 6. 64 ; Bell's Com. 31 ; Bell's Prin. 1276-7 ; Hunter, ii. 358.)

1392. *Bankruptcy of the Lessor or Lessee.*—Where the lessor becomes bankrupt, unless his creditors fulfil the contract by putting the lessee in possession of the subject let, his estate will be subject to a claim of damages ; but the lessee will not be entitled to decline to take possession if offered to him by the creditors. (Hunter, ii. 541.)

1393. The creditors of the lessee, on the other hand, may insist on proceeding with the contract, in which case the bankrupt's estate will be liable for the full hire, and not merely for a dividend. Even if the creditors should wish to abandon the contract, the lessor will be entitled to rank for the rent or hire for the whole term agreed on as the amount of his damage, deducting such sum as he may have actually received for the subject. (Hunter, ii. 559.)

### *Letting and Hiring of Ships.*

1394. The use of a ship may be let, either in whole or in part, either on *charter-party* or *general freight*.

1395. By the former, the use of the whole, or a certain portion of a ship, by ton-weight or barrel-bulk, is let for a certain period, for a certain purpose ; by the latter, the owners simply come under an engagement to carry goods, in terms of an advertisement or agreement. Both contracts are included in the general term *Affreightment*. (Ersk. iii. 3. 17 ; Bell's Prin. 405, 1 Bell's Com. 538.)

1396. The whole space agreed for by the freighter must be paid for, whether it is filled by his goods or not. (Bell's Com. 539; Bell's Prin. 409; Pothier (Charte Partie, No. 22, vol. ii., p. 377).)

1397. Such an agreement does not require to be in writing; but a regular charter-party, being always a written agreement, must be stamped. It may then contain a clause of registration for summary diligence. (Ersk. iii. 3. 17; Bell's Prin. 406; 1 Bell's Com. 539; 55 Geo. III., c. 78; 5 and 6 Vict., c. 79, sec. 21.)

1398. Both contracts imply, as conditions on the part of the owners and master:

1399. (1.) That the vessel shall be seaworthy and fitted for the particular voyage. (Bell's Prin. 408; 1 Bell's Com. 540; Abbot, 282, *et seq.*; Story's ed., 222; 1 Emerigon, 373; Pothier's Charte Partie, No. 30.)

1400. (2.) That she shall remain at the port ready for being loaded for a suitable time. (Bell's Prin. and Bell's Com. (*idem*).)

1401. (3.) That she shall sail at the appointed time, wind and weather permitting. (*Idem*; 1 Valin, 691; Abbot, 291.)

1402. (4.) That she shall be properly navigated. (Bell's Prin. and Bell's Com. (*idem*); Abbot, 299; 2 Kent's Com. 209.)

1403. (5.) That the goods shall be taken proper care of, and delivered as directed. (Bell's Prin. and Com., *idem*; Abbot, p. 309; Edinburgh and Leith Shipping Co., May 31, 1829, 2 Muir 136; Armstrong, Jan. 23, 1825, 3 S. D. 464; Bishop, Feb. 18, 1830, 8 S. D. 558; Rae, Feb. 7, 1832, 10 S. D. 303; Urquhart, March 12, 1833, 11 S. 567.)

1404. The freighter, on the other hand, becomes bound,

1405. (1.) To avoid undue delay in loading and unloading. (Bell's Com. 540; Bell's Prin. 409; Thomson v. Inglis, 3 Camp. 428; Wilson, March 10, 1809, F. C.)

1406. (2.) To pay the freight at the time specified, or, if no time be specified, at the end of the voyage. (Bell's Prin. 420, *et seq.*)

1407. *Bill of Lading*.—This, which is the shipmaster's receipt to the merchant for the goods put on board the ship, has, as formerly explained (*ante*, pp. 192, 193), become a very important negotiable instrument. In addition to being a receipt for the goods, the bill of lading is an obligation to deliver them at the port of destination to the shipper himself, or his order, or his assignees, or the bearer, or an assignee or purchaser expressly named, or his assignees. (1 Bell's Com. 542; Bell's Prin. 414; Abbot, 266.)

1408. Bills of lading, like foreign bills of exchange, are generally drawn in sets of three, "one of which bills being accomplished, the other two are to stand void." One of these bills is usually sent by post, one accompanies the cargo, and one remains with the shipper. (Bell's Prin. 417; Bell's Com. 543.)

1409. The general rule is, that shipowners, in common with other carriers, are liable for all accidents to goods under their charge, not caused "by the act of God and the king's enemies." But fire is expressly excepted by statute (26 Geo. III., c. 86, sec. 2), and the bill of lading usually extends the exception to "all and every other dangers and accidents of the seas, rivers, and navigations, of what nature and kind soever." (Bell's Com. 543; Abbot, 266; Bell's Prin. 414.)

1410. There is no obligation for gold, silver, watches, or jewels stolen, unless they be entered as such in the bill of lading, or their nature and value specially intimated in writing. (Bell's Prin. 436; Bell's Com. 562; 26 Geo. III., c. 86, sec. 3.)

1411. Shipowners are not liable beyond the value of the ship and freight for embezzlement by their servants, or for negligence occasioning injury to the cargo. (7 Geo. II., c. 15; 26 Geo. III., c. 80, sec. 1; 53 Geo. III., c. 159.)

*Shipmasters, Innkeepers, and Stablers.*

1412. The special responsibilities mentioned at the conclusion

of the last section are not peculiar to those who let ships, and undertake the transport of goods by sea. Though considerably modified both by statute and decisions, the general rule of the law of Scotland, adopted from a well-known edict of the Roman Prætor (the edict is in these words: "Nautæ, caupones, stabularii, quod cujusque salvum fore receperint, nisi restituent, in eos judicium dabo."—Dig., lib. iv., tit. 9), still is, that all persons who hold themselves out as public servants, willing to receive travellers and their goods for hire, whether for purposes of transport or of temporary custody and entertainment, are liable for the goods and effects committed to their care; that they are answerable for the acts of their servants, and even of other guests and passengers. The claimant was allowed, in the absence of other evidence, to prove the value of the lost article by his oath *in litem*. This oath, like the oath in supplement in cases of filiation, would probably be held superseded by the new law of evidence, by which parties are made admissible witnesses in their own cause. This point, however, has not yet been authoritatively decided. (Stair, i. 13. 3; Ersk. iii. 1. 28; Bell's Prin. 235; 1 Bell's Com. 466.)

1413. There is no liability on this ground for money taken from the pockets of the traveller; but if the money has been taken from the pockets of clothes which have been stolen, or from trunks that have been broken into, the innkeeper or carrier is liable. (Ersk. iii. 1. 28; Browster, June 5, 1707; Dict. 9240; M'Pherson, May 26, 1841, 3 D. 930.)

1414. There is no liability for articles of unusual value or fragility, unless an increased charge has been paid expressly as insurance in consequence of the nature of the subject (11 Geo. IV. and 1 Will. IV., c. 68; 17 and 18 Vict., c. 31); and the value of such articles must be proved by ordinary legal evidence. By the Railway and Canal Traffic Act of 1854, it is provided that the company shall be liable for neglect or default in the

carriage of goods, animals, etc., notwithstanding any notice or condition or declaration made by the company for the purpose of limiting their liability; but that the company shall not be liable beyond a limited amount, unless the value be declared and extra payment made. The proof of value is laid on the person claiming compensation.

1415. The innkeeper will be relieved from responsibility if the guest undertakes the exclusive charge of his goods; but it will not be presumed that he has done so though he may have adopted some peculiar arrangements for their safety. (Stair, i. 13. 3; 1 Bell's Com. 469; Bell's Prin. 236; see Gordon, Jan. 19, 1700, M. 9237; Hay, June 24, 1704, M. 9238; Farnworth v. Packwood, 1 Starkie 249; MacPherson, *sup.*)

1416. An innkeeper has a right to detain the horse or wearing apparel of a guest who refuses to pay his bill, even though the ground on which payment is refused is that the charges are excessive. (2 Bell's Com. 104; Bell's Prin. 1428; Johnson v. Hill, 3 Starkie 172; Naylor v. Mangles, 1 Esp. 109; York v. Greenhaugh, 2 Lord Raymond 866.)

1417. A railway company was found liable for luggage which, though not addressed, was delivered to a porter of the company by a passenger, who informed him of its destination, and who himself took a ticket for the same place; and this, although the passenger did not inquire for his luggage on a change of carriages, which took place in the course of the journey. In this case the value of the effects was ascertained by the oath of the passenger. It was observed on the bench, that the company might have refused to take the luggage without an address; but having taken it, they were answerable for its safe delivery. (Campbell v. Caledonian Ry., 27th May 1852.)

1418. The rule which applies to carriers has been held to include carters and porters, who offer themselves for hire to carry goods from one part of a city to another. (Bell's Com. 467;

Bell's Prin. 236; Ewing, July 1687, M. 9235; Manners, Dec. 2, 1769, M. 9245; 2 Kent, 598.)

1419. Hackney coachmen, however, have been said not to fall under it, as not being employed in the carriage of goods, nor in such journeys as to render luggage the necessary accompaniment of a passenger. From the extent to which such persons are now employed in the transport of luggage, the justice and expediency of this view seem extremely doubtful. (1 Bell's Com. 468; Bell's Prin. 236; Upshore v. Aidee, Com. Rep. 25; 1 Selwyn, N. P. 323; Jeremy's Law of Carriers, 13.)

1420. Wharfingers and warehousemen are exempted from the rule, and are liable only under the contract, or in accordance with mercantile usage. (1 Bell's Com. 467; Bell's Prin. 236; Ross v. Johnston, 5 Bru. 2825; Sideways v. Todd, 2 Starkie 400; Garside v. Trent Nav. Co., 4 Term Rep. 581; Webb and others, 8 Taunt. 443.) In England the principles of the edict have been commonly referred to the custom of the realm, and are more or less embodied in the Carriers' Acts.

1421. The question as to whether lodging-house keepers are included, is still undecided in Scotland. In England the negative view has been adopted, on the ground that they do not profess to entertain and lodge all travellers; and the same has been held with reference to coffee-house keepers not professing to lodge guests, and owners of public-houses merely for the sale of beer, etc. (See Cayle's case, in Smith's Leading Cases; Roscoe's Digest of the Law of Evidence at Nisi Prius, 9th edition, p. 415.)

1422. The Mercantile Law Amendment Act of 1856 (19 and 20 Vict., c. 60), provides that all carriers for hire of goods within Scotland, shall be liable to make good to the owner of such goods all losses arising from "accidental fire," while such goods were in the custody or possession of such carriers. (Sec. 17.) Though the words of the statute are general, it is probable that here, as in England, where the same rule prevails, an ex-



ception would be made in the case of fire occasioned by lightning, which is the act of God. (Chitty and Temple's Law of Carriers, p. 41.)

## CHAPTER VI.

### OF PLEDGE AND LIEN.

1423. *Pledge* is a contract by which one man advances a sum of money to another on the faith of a special moveable subject, of which the former obtains the temporary possession, but which he binds himself to redeliver on repayment of the money. It is further of the essence of this contract, that, if the money be not repaid within a reasonable period, which is usually fixed by stipulation, the holder of the subject, or pledgee, shall be entitled to bring it to sale. (Stair, i. 13. 11; Ersk. iii. 1. 33; 1 Bell's Com. 258; 2 Bell's Com. 20; Bell's Prin. 208 and 1363.)

1424. *Lien* differs from *pledge* in this, that in lien the property of the debtor is already in the hands of the creditor, who retains it in security for his debt. (Stair, i. 18. 7; Ersk. iii. 4. 20; 2 Bell's Com. 91; Bell's Prin. 1410.) The principal objects over which the right of lien rests are: A ship for repairs; goods conveyed by a carrier or shipowner for dues or freight; luggage, horses, or carriages of a traveller, for the price of entertainment at an inn; and cattle pastured in a field, for the value of the grass. Law agents have also a lien over the title-deeds of their clients for payment of their accounts, and bankers over bills of their customers not discounted. Another case in which lien has been admitted is that of successive purchases for the balance; thus, if A purchased three lots of sugar from B without paying the price, and bought a fourth for which he

did pay, the seller would be entitled to retain the last lot in security for the balance. (*Mein v. Boyle and Co.*, 17th January 1828.)

1425. As regards lien for remuneration for labour, an important distinction is to be noted between the case in which the contract of service has reference to a particular piece of work (*locatio operis*), and that in which it has reference to work in general (*locatio operarum*). In the former case, as when one hires a tradesman to perform a certain operation on an object which is delivered to him, the tradesman is entitled to retain the object till he is paid for his work. A watchmaker may retain a watch given him to clean till he be paid for cleaning it, because it came lawfully into his possession, and lawful possession is the foundation of the right of retention. In the latter case, of which domestic service may be taken as the most prominent example, the servant has no right to retain any portion of his master's property in security of his wages, the property never having been in his lawful possession at all. (*Fraser*, ii. 431-2; *Burns v. Bruce*, *Hume*, p. 29.)

1426. The nature of hypothec has been already illustrated. (*Ante*, p. 282.) It differs from both pledge and lien in this, that the subject of it remains in the hands of the debtor (*Stair*, i. 13. 14; *Ersk.* iii. 1. 34; 2 *Bell's Com.* 25; *Bell's Prin.* 1385.)

1427. The chief occasions in which pledge is resorted to, are—(1.) Temporary pressure for money on the part of a merchant possessed of goods, of which, from the accidental state of the market, he is unable or unwilling to dispose; and (2.) Extreme poverty.

1428. Its employment in the former case usually takes place under the Warehousing, in the latter, under the Pawnbroking Acts.

1429. In addition to the benefits which result to trade from its ordinary employment under the former enactments, it has

sometimes been employed by Government in extraordinary circumstances with the most remarkable advantage. Of this Mr Bell has given an interesting example in his Commentaries, vol. ii., p. 21. "In 1793," he says, "in consequence of many concurring causes of despondency which marked that eventful period, there was throughout Great Britain a general distrust. A number of country banks stopped payment; discounts were entirely at an end; the Bank of England refused to go further in supporting the mercantile classes; and many eminent manufacturers suspended their works, and were utterly unable to resume them, or afford employment to their labourers. At this crisis Government interfered. Parliament authorized (33 Geo. III., c. 29) five millions to be lent on Exchequer bills on the deposits of goods; and in a very short time credit was restored as by a miracle. Not more, perhaps, than one-fifth of the whole sum was ever called for. The mere knowledge of the relief restored confidence; and the commissioners on the Act reported, that 'the advantages of this measure were evinced by a speedy restoration of confidence in mercantile transactions; and that the whole sums advanced on loans were paid, a considerable part before it was due, and the remainder gradually at the stated periods, without apparent difficulty or distress.'" It is very important that the results of so successful an experiment in finance should not be forgotten.

1430. The latest Act for regulating the warehousing of goods under bond is 8 and 9 Vict., c. 91.

1431. It is therein provided that the Commissioners of the Treasury shall fix upon certain warehousing ports, and shall there appoint warehouses in which goods may be kept, without payment of any duty on their entry, upon bond granted for the ultimate payment of the full dues of importation, or, where the goods are prohibited to be imported for home use, for their due exportation. (Secs. 1, 2, and 8.)

1432. Such bonds may be granted, either by the keeper or proprietor of the warehouse, in a general shape, and for the purpose of covering all the goods deposited with him, or by the different importers of the separate quantities of goods. (Sec. 8.)

1433. The goods must be carried to the warehouse under authority of an officer of customs (sec. 15), and must be produced to such officers on demand, under a penalty of L.5.

1434. All goods so warehoused must be cleared, either for exportation or home use, within three years, and surplus ships' stores in one year; and if not so cleared they shall be sold, and the produce applied to payment of the warehouse rent and other charges,—the overplus (if any) being paid to the proprietor. The purchaser is allowed three months for clearing, at the expiry of which the goods are forfeited.

1435. Consignment of goods sent from a distance in security or satisfaction of debt, is another mode in which the contract of pledge is in frequent use by merchants in one country who have creditors in another.

1436. *Pawnbroking* is a transaction which has everywhere been regulated by the most stringent legal provisions for the prevention of fraud and oppression. The earliest statute on the subject is 1 James I., c. 21, the latest 19 and 20 Vict., c. 27, and 23 Vict., c. 21; the leading enactment by which those which had preceded it were consolidated, and which, in connection with the General Burgh Police Act, 13 and 14 Vict., c. 33, and local police arrangements, still regulates the business of pawnbroking, being 39 and 40 Geo. III., c. 99 (28th July 1800).

1437. The most prominent statutory requirements are—that each pawnbroker shall take out an annual license; that he shall have his name as a pawnbroker over his door; that he shall not take pawns before or after certain hours of the day—from

persons intoxicated, or under twelve years of age ; that he shall enter each article in a book, with a note of the name and abode of the pawner, and deliver to him a duplicate of such note, to be produced when the article is reclaimed ; that the advance shall not exceed L.10 on one article ; that each article shall be kept for a year, after which it may be sold by the broker, unless in the case of notice being given for a further indulgence of three months. (See Barelay's Justice of the Peace, and M'Glashan's Digest of the Laws of Pawnbroking.)

1438. 23 Vict., c. 21, sec. 1, modifies the sixth section of 39 and 40 Geo. IV., to the effect of permitting pawnbrokers to charge one halfpenny for every note or memorandum describing the objects pawned, where the sum lent shall be less than ten shillings ; and enacts that the "said sixth section of the said Act shall be read and construed as if it contained no enactment for the delivery of any note or memorandum gratis." The payments for pawns of ten shillings or upwards remain as regulated by the section above referred to.

1439. In order to prevent depredations by workmen and apprentices, the pawning of unfinished goods is prohibited.

1440. By the Act 19 and 20 Vict., c. 27 (23d June 1856), above mentioned, it is provided that the following persons shall be deemed to be pawnbrokers within the meaning of the previous Acts, viz.:—"Every person who shall keep a house, shop, or other place for the purchase or sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and shall purchase, or receive, or take in any goods or chattels, and pay, or advance, or lend thereon a sum not exceeding L.10, with or under any arrangement or understanding, express or implied, or which from the nature or character of the dealing may reasonably be inferred, that such goods or chattels may be afterwards redeemed or repurchased on any terms whatever." (Sec. 1.)

1441. If any person declared to be a pawnbroker under this or any of the previous Acts shall fail to take out the proper license, he shall forfeit L.50, which shall be recoverable by summary information before any Justice of the Peace in the name of an officer of the Inland Revenue ; the justices being empowered to mitigate the said penalty to one-fourth.

1442. The proceeding may take place before a Sheriff or Sheriff-substitute in Scotland ; in which case there shall be no appeal to the Quarter Sessions, but the judgment of the Sheriff shall be final.

## CHAPTER VII.

### BANKRUPTCY AND INSOLVENCY.

1443. Every system of bankrupt law must have the two following objects primarily in view :—1st, The economical realization of the funds of the bankrupt ; and 2d, Their fair and equal application, to as great an amount as possible, to the payment of his debts.

1444. In order to the attainment of these ends, it is necessary—1st, That the proceedings should be carried through with as much expedition as can possibly be made to consist with justice ; because, in mercantile transactions above all others, time is money. 2d, That all misappropriation of funds by the debtor, and all undue preference of one creditor over another, should be checked from the first moment of insolvency. 3d, That the estate should be placed under one neutral management for the benefit of all the creditors, and thus the expense of separate proceedings by individual creditors, which might fall to be paid by the whole estate, should be avoided. 4th, That an effective control should be established over this management by the public

judicatories of the country, so as to exclude the possibility either of partiality or of undue delay in distributing the funds. 5th, That the judicial proceedings necessary for the adjustment of doubtful or disputed claims should be as cheap and simple as possible. 6th, That whilst the honest debtor is discharged from his debts, or at least protected against diligence, every means should be adopted to detect fraud, to defeat concealment, to secure evidence of such offences, and to punish their perpetrator, or at least to deprive him of protection and discharge.

1445. As our limits preclude any attempt at an historical review of so wide a subject as the Bankrupt Law of Scotland, we shall endeavour to state, as concisely as possible, the special means by which the objects here enumerated have been sought to be attained by the recent "Act to Consolidate and Amend the Laws relating to Bankruptcy in Scotland" (19 and 20 Vict., c. 79 (1856)), and the amending Act (20 and 21 Vict., c. 19).

1446. *Sequestration*.—A sequestration at common law is a process by which an heritable estate, regarding which a litigation is pending, is taken possession of by the Court in order to its being preserved from dilapidation, and managed under judicial authority, till the interests of the respective claimants be ascertained.

1447. The statutory sequestration in a mercantile bankruptcy, on the other hand, is the usual, though not the only mode, by which an insolvent debtor brings himself, or is brought by his creditors, within the operation of the bankrupt laws.

1448. By this proceeding, the whole estate of the bankrupt, heritable and moveable, is removed from his control, and placed under judicial authority, in order to its being vested in a neutral person for distribution among his creditors; whilst the creditors themselves, from being isolated individuals with opposing interests, are by the comparative equality of rights henceforth existing amongst them, all formed into one body with common interests for the attainment of a common object.

1449. As it is usually by means of a sequestration that a debtor is discharged from his obligations, and his future acquisitions protected from diligence, it is commonly granted on his own petition, with the concurrence of one or more of his creditors. The concurrence of one creditor to the extent of L.50, of two to the extent of L.70, or of three or more to the extent of L.100, is sufficient. In addition to the prospect of ultimate discharge, the sequestration is commonly accompanied by a present protection from arrest or imprisonment for debt contracted previous to its date, until the first meeting of creditors.

1450. The circumstances in which sequestration will be granted at the instance of his creditors, where the debtor is either dead or declines to petition, are enumerated in the 13th sec. of the recent Act.

1451. The same section introduces a very important alteration, by extending the remedy of sequestration, which was formerly confined to persons engaged in some species of mercantile or trading transactions, to all persons whatsoever. The ground of the restriction was, that as an honest bankruptcy was scarcely conceivable in the case of a person not engaged in trade, the benefits of a process, which was to terminate in discharge upon less than full payment of the debt, would, in their case, be little else than a premium on improvidence. The infinite ramifications of trade, whereby almost every member of the community has become a shareholder in some species of trading company, had long rendered the restriction practically inoperative; and its removal will put an end to a class of questions, the discussion of which had no other effect than to diminish the common fund for ultimate distribution. All that is now requisite is, that the applicant shall be subject to the jurisdiction of the Supreme Courts of Scotland.

1452. Where any delay occurs as to granting sequestration,



or where unusual promptitude is required, either for the purpose of checking fraud, or disposing of perishable goods, it is competent for the Court to which the petition has been presented, either on special application or at their own instance, to take measures for the preservation of the estate in the meantime, either by the appointment of a judicial factor, or by such other proceeding as may be judged necessary. (Sec. 16.) Formerly the temporary custody and preservation of the estate was confided to an interim factor, elected by the creditors. The powers of the interim factor were more extensive than those of the judicial factor thus appointed by the Court, in consequence of the longer space which, under the former system, might intervene between the granting of the sequestration and the appointment of the trustee.

1453. During the short period which may still elapse before the trustee is appointed, the Sheriff has power to cause the books and papers of the bankrupt to be sealed, and to lock up his shop or other premises and keep the key, till the trustee is elected and confirmed.

1454. Another very important regulation introduced by the Act is, that sequestration may be awarded either by the Court of Session or by the Sheriff of any county in which the debtor, for the year preceding the date of the petition, has resided or carried on business; and that, in the case of two or more sequestrations being awarded by different courts, the later ones shall be remitted to the first in date.

1455. The sequestration may be opposed either by the debtor himself, who may object to a proceeding which deprives him of the capacities of a solvent person, and proclaims him as a bankrupt to the whole world; or by creditors who may have a prospect of acquiring preferences which the sequestration will destroy.

1456. A sequestration may be recalled, even after it has been

granted, by a majority in number and four-fifths in value of the creditors resolving that the estate shall be wound up under a private deed of agreement, and applying to the Lord Ordinary to sist procedure. On production to him of a reasonable deed of agreement, properly executed, the Lord Ordinary or the Sheriff will declare the sequestration at an end. It is further provided by the Bankruptcy Amendment Act of 1860 (23 and 24 Vict., c. 33), that where it shall appear to the Court of Session or the Lord Ordinary, upon a petition by the accountant in bankruptcy, or any creditor or other person having interest, presented within three months after the date of sequestration, that a majority of the creditors in number and value reside in England or Ireland, and that from the situation of the property of the bankrupt, or other causes, his estate and effects ought to be distributed among the creditors under the Bankrupt or Insolvent laws of England or Ireland, the Court or Lord Ordinary, after such inquiry as shall seem fit, may recall the sequestration.

1457. But let us suppose that the sequestration proceeds in the usual manner.—In the deliverance by which it is granted, whether by the Lord Ordinary or the Sheriff, the creditors are appointed to meet at a specified place and hour on a specified day, which shall not be less than six or more than twelve days from the date of the notice of sequestration, which the Act requires to be inserted in the *Edinburgh Gazette* (23 and 24 Vict., c. 33, sec. 5), for the election of a trustee or of trustees in succession. (Sec. 67.) The trustee in a mercantile sequestration under the bankrupt statutes differs from a judicial factor in a sequestration at common law in this essential point, that whereas the latter is an administrator merely, the latter is a distributor of the estate entrusted to him. “The general description of the office and duties of the trustee,” says Mr Bell, “is this: He is the trust proprietor and manager of the estate and effects; the

judge, in the first instance, of all claims of debt and preferences, and the distributor of the divisible fund."

1458. As it is a matter of the highest importance that the trustee shall be impartial, it is enacted (sec. 68) that it shall not be lawful to elect the bankrupt, nor any person "conjunct or confident" with him, or whose interests are opposed to the general interests of the creditors. The trustee must also be resident within the jurisdiction of the Court of Session. It is neither unlawful nor unusual for a creditor to be trustee where he has no material interest adverse to that of the other creditors. On the same ground, whoever is the mere creature of a person who would be ineligible himself, is ineligible. It is for the creditors to judge of the respective qualifications of rival candidates for the office of trustee, and the Court will not interfere with their decision.

1459. If two or more creditors shall give notice to the Sheriff of the county, he shall attend either in person or by his substitute, and preside at the meeting for the election of the trustee. The Sheriff-clerk or his depute must also be present, and write the minutes in presence of the meeting, and perform the other duties of clerk.

1460. When the Sheriff is not present, the creditors elect their own preses, and, when the Sheriff-clerk is not present, their clerk. The minutes must be signed by the person who presides, and they ought strictly to be written and executed in presence of the meeting. They begin by a list of the persons present, and this forms the record of voters. They also contain a statement that the vouchers, grounds of debt, and oaths of verity have been regularly produced, and that the mandates of those creditors who claim to vote by agents were shown to the meeting. The amount of debt on which each claimant votes should also be set forth. (Sec. 68.)

1461. The creditor is bound in his oath to put a specific value

on any security which he may hold for his debt over the bankrupt estate, and to deduct its value from the debt. He is then entitled to vote on the balance. If the creditor has an obligant bound to him along with the bankrupt, such obligation shall be valued and deducted in the same manner. The like deductions must be made to entitle the creditor to be ranked in order to draw a dividend, and, on payment of the balance, the trustee is entitled to a conveyance of the security for behoof of the estate.

1462. The creditors and their mandatories, thus entitled to vote, shall then and there elect a fit person to be trustee. (Sec. 68.)

1463. The election of the trustee, and all other questions at meetings of creditors not otherwise provided for, is decided by the majority *in value* of those present and entitled to vote. (Sec. 101.)

1464. If there be no competition or objection, the Sheriff, if present, declares the person chosen to be trustee by a deliverance on the minutes, or, if absent, on the proceedings being reported to him by the preses.

1465. If there be competition or objections to candidates, such objections shall be stated at the meeting, and the Sheriff may either decide them forthwith or take them to avizandum. If he should adopt the latter course, he is to make a note of the objections and answers, and to hear the parties on them *viva voce* within four days. (Secs. 69 and 70.) The Sheriff shall then pronounce a judgment, declaring the person whom he shall find to have been elected to be trustee. This judgment shall be given with the least possible delay, and shall be final, and in no case subject to review in any court or in any manner whatever. (Sec. 71.) Wherever objections have been stated to the trustee elected by the majority, it is prudent to elect another trustee or trustees, who shall succeed to the office in case of the election of

the first being annulled. If this arrangement, which the statute authorizes, be neglected, the whole election will be annulled, should a personal objection to the first trustee be sustained by the Sheriff. (Bell's Com., p. 1224.)

1466. A creditor is not excluded from voting in the election though he should be himself ineligible.

1467. Where the estates both of a company and of the individual partners are sequestrated, the two sets of creditors may concur in electing the same trustee.

1468. The creditors, at the meeting at which the trustee is elected, are to fix a sum for which he shall find security, and decide on the sufficiency of such security as he may offer. (Sec. 72.)

1469. Unless the creditors limit the sum, the Court will require security for the whole intromissions.

1470. On the decision of the Sheriff declaring the person duly elected, and on a bond by the trustee and his cautioner being lodged, the Sheriff shall confirm the election, and his confirmation shall be final; and the Sheriff-clerk shall issue an act and warrant to the trustee, who shall immediately transmit a copy of it to the accountant in bankruptcy, in order that his name and designation may be entered in the register of sequestrations. This act and warrant shall be a title to the trustee to perform the duties imposed by the Act, and shall be evidence of his right and title to the sequestrated estates, both heritable and moveable. It also vests in the trustee all real estate in England, Ireland, and the Colonies, provided it be registered in the chief Court of Bankruptcy for the country in which the property is situated. (Sec. 73.)

1471. *Commissioners*.—After the election of the trustee, the creditors are to elect, at the same meeting, three commissioners, who must be either creditors or mandatories of creditors. The proceedings are the same as those for the election of the trustee; and no person shall be qualified who was not eligible as trustee.

The commissioners are not required to find security. (Sec. 75.) A majority of the creditors, assembled at any meeting duly called for that purpose, may remove a commissioner and elect another in his place. (Sec. 76.)

1472. The commissioners are a committee of the creditors for assisting the trustee in the management of the estate, and superintending his proceedings, and concurring with him in submissions and transactions. To them also is entrusted the important duty of declaring the dividends. (Secs. 125, 130, and 132.) Any commissioner may make such report as he thinks fit to a general meeting of creditors.

1473. *Removal of Trustee and Commissioners.*—A majority in number and value of the creditors, present at any meeting duly called for the purpose, may remove the trustee or accept his resignation. One-fourth of the creditors in value may at any time apply to the Lord Ordinary for the trustee's removal; and if the Lord Ordinary be satisfied that sufficient reason has been shown, he shall remove the trustee, and appoint a meeting of creditors to be held, for devolving the estate on the trustee next in succession, or electing a new one.

1474. The accountant in bankruptcy, appointed by sec. 156, is required to take cognisance of the conduct of all trustees and commissioners; and in the event of their not faithfully performing their duties, to report the same to the Court of Session; who, after hearing such trustees or commissioners, shall have power to censure or remove them from their office, or deal with them otherwise as justice may require. (Sec. 159.)

1475. Each trustee must make an annual return, through the Sheriff-clerk, to the accountant of the position of the estate under his charge; and any trustee failing to make such return shall be removable at the instance of the accountant or of one creditor, be subject to such censure as the Lord Ordinary may think suitable, and be found liable in expenses.

1476. Where the trustee is removed by a majority of the creditors, it is not necessary that any cause should be assigned.

1477. The trustee cannot resign against the wish of the creditors; and even a resolution by a majority in value and number, to accept his resignation, may be brought under review of the Court.

1478. *Trustee's Inventory.*—As soon as the trustee has taken possession of the bankrupt's estate, he must make up an inventory and valuation, and transmit a copy thereof to the accountant.

1479. The bankrupt is bound to afford to his creditors every information regarding his property, both actually existing and in expectancy, and so aid the trustee in the execution of his duty. In case of his failure to do so, or to grant any deed requisite for the recovery or disposal of his estate, the trustee may apply to the Sheriff, who, unless cause be shown to the contrary, shall grant a warrant for his imprisonment. (Sec. 81.) For his sustenance whilst engaged in the duties imposed on him, an allowance is made to the bankrupt, the maximum of which, except in extraordinary circumstances, is fixed at three guineas a-week.

1480. *Examination of the Bankrupt.*—Within eight days after his confirmation, the trustee must apply to the Sheriff to fix a day for the public examination of the bankrupt; whereupon the Sheriff issues a warrant for him to attend within the Sheriff-Court house on a specified day, not sooner than seven or later than fourteen days from the date of the warrant. The examination, taken upon oath, is written or dictated by the Sheriff, and authenticated as a regular deposition. If the bankrupt refuse to answer questions, or to produce books, deeds, and other documents, without lawful cause shown, he may be committed to prison by the Sheriff. He is not bound to answer any question that has a tendency to criminate himself; but he must

submit to the risk of his refusal involving him in the guilt of undue concealment, if there be any property thereby left unaccounted for.

1481. The Sheriff cannot, in the course of the examination, legally commit for punishment of prevarication, perjury, or concealment, as crimes. The remedy is under the criminal law, by a commitment for trial, on due application being made. The proper commitment, where there is no new application of a criminal nature, is simply "till he shall make a full and satisfactory answer to the question put," and this question ought to be specified in the warrant. (Bell's Com. ii. 1239, Shaw's edition.)

1482. *Examination of Conjunct and Confident Persons.*—The Sheriff may at any time, on the application of the trustee, order an examination of the bankrupt's wife and family, clerks, servants, factors, law agents, and others who can give information relative to his estate, and issue his warrant for their appearance. (Sec. 90.)

1483. Although, by the common law, a wife is not a competent witness for or against her husband, yet, by the statute, she may be examined for the discovery of the estate concealed, kept, or disposed of by herself or others whom she has employed.

1484. *Discharge of the Bankrupt on Composition.*—An offer of composition on the whole debts, with security for payment of the same, may be made, either by the bankrupt or his representatives, at the meeting for the election of the trustee, or at the subsequent meeting; and if this offer be entertained and finally accepted by a majority in number and four-fifths in value, the bankrupt, on making a declaration or oath before the Sheriff or Lord Ordinary, to the effect that he has made a full and fair surrender of his estate, shall be discharged of all debts and obligations for which he was liable at the date of the sequestra



tion ; and the sequestration shall be at an end, and the bankrupt reinvested in his estate, reserving the claims of the creditors for the said composition against him and the cautioner. (Secs. 137, 138, 139, 140.) But the sequestration shall go on notwithstanding any offer of composition, and the trustee shall proceed as if no such offer had been made, until the deliverance by the Lord Ordinary or Sheriff, when the sequestration shall cease, and the trustee be exonerated and discharged. (Sec. 142.) If the offer of composition be rejected, no other can be entertained unless nine-tenths of the creditors ranked shall agree.

1485. *Discharge of Bankrupt without Composition.*—1st, The bankrupt may, at any time after the meeting held after his examination, petition the Lord Ordinary or Sheriff for his discharge, provided every creditor shall concur in the petition ; 2d, He may present such petition on the expiration of six months from the date of the deliverance awarding sequestration, provided a majority in number and four-fifths in value of the creditors concur ; 3d, He may do so on the expiration of eighteen months after said deliverance, with concurrence of a majority in number and value ; or 4th, He may do so on the expiration of two years from the same date, without any consent of creditors. If there is no opposition, the Sheriff shall grant the discharge in twenty-one days after the petition has been intimated in the *Gazette* ; and if appearance is made, he shall dispose of the objections, and grant the discharge, or delay it, or refuse it, as he may see cause. It is provided, however, by the Bankruptcy Amendment Act of 1860, 23 and 24 Vict., c. 33, sec. 3, that either the Court of Session, or the Lord Ordinary, or the Sheriff, may refuse the application for discharge, although two years have elapsed from the date of the sequestration ; and although no appearance or opposition shall be made by or on the part of any of the creditors, if it shall appear from the report of the

accountant in bankruptcy, or other sufficient evidence, that the bankrupt has fraudulently concealed any part of his estate or effects, or has wilfully failed to comply with any of the provisions of "the Bankruptcy (Scotland) Act, 1856."

1486. *Notour Bankruptcy*.—In order to render more effectual what were in reality the principles of the common law, and check, if possible, the complicated frauds so frequently practised on the eve of bankruptcy, it was provided, by 1621, c. 18, that no debtor after insolvency should fraudulently diminish the funds, which in reality belonged not to him, but to his creditors; and, further, that fraudulent dealing should be presumed if the deed was gratuitous, executed after the contracting of debt, and in favour of a near relation or a confidential friend. The subsequent Act, 1696, c. 5, declared that all voluntary dispositions, assignments, and other deeds granted by the bankrupt, at or after the time of his bankruptcy, or within sixty days of it, in favour of a creditor, either in satisfaction or further security of debt, should be null. These provisions have been retained, and others with a similar object introduced, by subsequent enactments. (Secs. 107 to 111.) All alienations not subject to these or any other objections, either statutory or at common law, fall, like preferable and protected debts, to be deducted in the first instance from the fund for distribution among the creditors; and hence, with reference to the interruption of prescription in Scotland, the statute of limitations in England, and for many other purposes, as well as with a view to subsequent acquisitions, the importance of fixing the precise period at which legal bankruptcy takes place.

1487. By sec. 7 of the recent Act, it is provided that notour bankruptcy in the case of an individual shall be constituted by the following circumstances:—

1488. 1. By sequestration in Scotland, or by the issuing of an adjudication of bankruptcy in England or Ireland.

1489. 2. By insolvency, concurring either—(1.) with a duly executed charge for payment, followed, where imprisonment is competent, by imprisonment; or (2.) formal and regular apprehension of the debtor; or (3.) by his flight or absconding from diligence; or (4.) retreat to the sanctuary; or (5.) forcible defending of his person against diligence; or, where imprisonment is incompetent or impossible, (6.) by execution of arrestment of any of the debtor's effects not loosed or discharged for fifteen days, or by execution of poinding of any of his moveables, or by decree of adjudication of any part of his heritable estate for payment or in security.

1490. 3. *Notour Bankruptcy will farther be constituted*,—By insolvency concurring with (1.) sale of any effects belonging to the debtor under a poinding; or (2.) under a sequestration for rent; or (3.) with his retiring to the sanctuary for 24 hours; or (4.) with his making application for the benefit of *cessio bonorum*.

1491. Sec. 8 enacts, that in the case of a company, notour bankruptcy shall be constituted either in any of the foregoing ways, or by any of the partners being rendered notour bankrupt for a company debt.

1492. Notour bankruptcy commences from the time when its several requisites concur, and continues till the debtor obtains his discharge, or till insolvency ceases. (Sec. 9.)

1493. *Ranking*.—The general rule of ranking is, that all arrestments and poindings which have been used within 60 days prior to the constitution of notour bankruptcy, or within four months thereafter, shall be ranked *pari passu*, as if they had all been used of the same date.

1494. *Cessio Bonorum*.—This equitable process for the relief of the debtor from the severity of the early laws of imprisonment for debt, was introduced into the Roman law by Julius Cæsar. From this source it was borrowed by us, probably passing

through the medium of the law of France. (See its History in Bell's Com. (Shaw's ed.), vol. ii., p. 1092.)

1495. The jurisdiction in cessios, which formerly belonged exclusively to the Court of Session, was, by 6 and 7 Will. IV., c. 56, extended to Sheriffs. The following are the leading provisions of this statute, and of the Act of Sederunt, 6th June 1839, by which the law of cessios is still mainly regulated:—

1496. Any debtor in prison at the time, or who has been in prison, or against whom a warrant of imprisonment has been issued, may apply for decree of cessio. In the petition he sets forth his inability to pay his debts, and his willingness to surrender his estates, and prays for interim protection. The petition is intimated to the creditors in the *Gazette*, and the bankrupt lodges a state of his affairs, subscribed by himself, with all books and papers relating to his affairs, with the Sheriff-clerk. On a day appointed for compearance, the debtor is examined before the Sheriff on oath; and if the creditors object to the petition, they are heard, and if necessary, a proof is allowed. The Sheriff may either grant decree or refuse it, or make such other order as to him may seem just,—his order being subject to review by the Court, or the Lord Ordinary in vacation.

1497. Cases originating in the Court of Session are left on the former footing; and are consequently sued out in the form of a summons, to which all the creditors are called as defenders. Any one of the creditors may appear in this action; and the pursuer will not be allowed the benefit of the process till he has satisfied the Court that his inability to pay his debt has arisen from misfortune, and that his disclosure of the state of his affairs is full and honest. The burden of proving his objections, however, will be laid on the creditor.

1498. It is competent either for the Sheriff or the Court to grant protection or liberation to the debtor whilst the process

is pending, provided he find caution to attend all diets when required.

1499. A decree of cessio operates as an assignation of the debtor's moveables for behoof of the creditors, in favour of a trustee mentioned in the decree.

1500. Trustees in cessios, like those in sequestrations, are now placed under the supervision of the accountant in bankruptcy by sec. 167 of the Bankrupt Act.

1501. A decree of cessio differs from a sequestration, in conferring on the bankrupt no power to insist on his discharge; and it affords, consequently, no protection against the attachment of his subsequent acquisitions by his creditors. Before proceeding to new acquisitions, however, the creditors are bound to realize those conveyed to them by the disposition *omnium bonorum*, and apply them to the extinction of his debts.

1502. The debtor has the privilege of retaining his working tools; but nothing beyond a mere aliment will be allowed, even to half-pay officers and clergymen.

1503. Section 168 of the recent statute enacts, that a majority in number and value of the creditors, if it shall appear to them that the estate is not likely to yield free funds for division after payment of preferable debts and expenses beyond L.100, may resolve that the bankrupt shall only be entitled to apply for a decree of cessio, and shall have no right to a discharge in the sequestration. This resolution may be brought under review of the Lord Ordinary or the Sheriff; but if it is confirmed, the bankrupt shall have no right to a discharge in the sequestration, but shall be entitled to apply for a decree of cessio, and the Court shall have power to grant the cessio in the sequestration without requiring the bankrupt to bring a separate process; and in all other respects the sequestration shall be proceeded with in common form.

## CHAPTER VIII.

## OF BILLS AND PROMISSORY NOTES.

1504. The constant occurrence of pecuniary transactions amongst merchants has led them, in all civilised countries, to adopt expedients for cancelling their obligations to each other, without the trouble and risk attendant on the actual transmission of money, and for avoiding the inconveniences inseparable from delay, by substituting credit for present payment.

1505. Bills of exchange, inland bills, and promissory notes, the instruments by which these objects are usually effected, are the simplest in form, whilst at the same time they are the most rapid in execution, of all obligations known in law.

1506. Like all other mercantile instruments, they are exempted from the cumbrous forms of authentication required in common deeds, and this exemption they enjoy even when employed in the constitution of ordinary money obligations. Neither in this nor in other respects is there any distinction in law between these instruments when applied to mercantile and non-mercantile transactions; and as they are now very extensively employed in the latter, it is requisite that the danger of forgery, to which their mercantile privileges expose them, should be guarded against by the strictest conformity to such rules as law and custom have imposed on them.

1507. In addition to that just mentioned, bills and notes possess two other remarkable privileges, viz., transmission by indorsation, or simple delivery, and summary execution.

1508. To the first they are indebted for the great value which they possess as circulating media in trade; by the second, a

cheap and efficacious method of enforcing the obligations which they constitute is supplied, without the intervention of litigation.

1509. *A Bill of Exchange* is a request, in the form of an open letter, addressed by a person called the drawer to his debtor or correspondent abroad, who is called the drawee, desiring him to pay to a third person, usually the creditor of the drawer, called the payee or porteur, a sum of money within a certain time after date, or on demand, or on sight of the bill. After the bill has been signed by the person to whom it is addressed (the drawee), in token of his willingness to comply with the request which it conveys, he is then called the *acceptor*. The bill then constitutes a debt against him in favour of the payee, and has the same effect as if money for the use of the latter had been actually transmitted and lodged with the acceptor. (Stair, i. 11. 7; Ersk. iii. 2. 25; Bell's Com. i. 386; Bell's Prin. 306.)

1510. To obviate the risk of loss, it is usual to draw foreign bills in sets of two or three, and to transmit them by different conveyances.

1511. Though no express form of words is legally requisite in mercantile instruments, custom has fixed certain modes of expression from which it is scarcely safe to deviate. The following is the usual form of an ordinary foreign bill :—

L.100 sterling.

Glasgow, March 1, 1860.

At sixty days after sight (or other future time) of this my (first) of exchange, second and third of same date and tenor being unpaid, pay to my order (or to C. D. or order) the sum of one hundred pounds sterling, for value as advised.

(Signed) A B.

B C and Co.

To Messrs B C and Co.,

Merchants, Trieste.

(Date acceptance.)

1512. Bills or notes for sums under 20s. are absolutely void. Bills for sums above 20s. and less than L.5 require for their validity to be drawn in a certain form, and subject to certain conditions, provided by 8 and 9 Vict., c. 38, sec. 17. These enactments do not apply to bills above L.5. 23 and 24 Vict., c. 111, sec. 19, now provides that a draft on a banker, who shall *bona fide* hold money belonging to the party, payable to bearer or order on demand, of any sum less than 20s., shall be valid.

1513. *An Inland Bill* is simply the foreign bill applied to inland trade (19 and 20 Vict., c. 60, sec. 12); its object being to make payments in the most convenient form, allowing for the credit or delay in payment usually given in the particular line of traffic. There are here, for the most part, only two parties,—the creditor who draws the bill, and is himself the payee, and the debtor who accepts it; though a third party is often introduced as payee. After acceptance, the bill either remains with the drawer, or is by him assigned by indorsement in payment of debt, or for ready money, usually to a banker. (Bell's Prin. 307; Thomson on Bills, p. 2; Bell's Com. 387.) If not paid at the date mentioned, or, as it is said, "*retired on maturity*," it may be put to immediate execution; that is to say, the debt of which it is an acknowledgment may be exacted from the acceptor by the summary legal process afterwards to be explained.

1514. The following is its simplest form :—

L.100.

Leith, March 1, '60.

Three months after date, pay to me, or order, the sum of one hundred pounds sterling for value.

(Signed)      A B.  
                                 C D.

To C D, Grocer,  
                    Edinburgh.

1515.—The form, of course, may be varied by specifying the



place of payment, by being drawn in favour of a third party, or on several parties jointly and severally, by being made payable at sight or at a certain time after sight, or by instalments.

1516. "Where a bill is drawn, payable at a certain time after sight, the date of presentment must be marked, in order to regulate the term of payment. It has been found to be no objection to the genuineness of this date, that it is written in a different hand from the drawee's signature, as the date is often written by a clerk before the acceptance." (Thomson on Bills, p. 341-2, and note; see Acceptance, *infra*.)

1517. *Promissory Notes*, though the simplest of all in form, came last into use as negotiable instruments. Here the debtor, who is called the maker of the note, promises within a certain time, on a specified day, or on demand, to pay to the creditor named in the note a certain sum. (Bell's Com. 387; Bell's Prin. 307.) Thus:

L.100.

Edinburgh, March 1, '59.

I promise to pay on demand (or at some other period) to A B or order, within my house (or elsewhere), the sum of one hundred pounds sterling for value.

(Signed) C D.

1518. Such notes may be granted by several persons obliging themselves jointly and severally to pay either the whole sum at once or by instalments. They may be passed from one to another by indorsation the same as bills, and have the same privilege of summary execution.

1519. *Requisites of Bills and Notes*.—These documents must be perfectly clear and intelligible, otherwise they will not be entitled to summary execution, whatever may be their ultimate value as adminicles of proof.

1520. Further, the obligation must be absolute; for if words be added which render it conditional or contingent, the writing,

even although holograph and valid as a voucher of debt, will not enjoy the privileges of a bill. Such, however, will not be the case where the words are merely explanatory, and leave the essence of the obligation unconditional. (Bell's Com. i., Shaw's ed., 306; Bell's Prin. 311; Thomson on Bills, p. 10, and cases cited.)

1521. A bill must be for money, not goods (Bell's Com. 389; Bell's Prin. 311; Ersk. iii. 2. 38; Leslie v. Robertson, 16th Dec. 1713, M. 1397; Douglas v. Erskine, 18th Feb. 1715, M. 1317; Bruce v. Wark, Nov. 17, 1729, M. 1399); and in England it has even been held that a note payable in money, "or Bank of England notes," was bad. (Thomson on Bills, p. 9; *ex parte* Jamieson, 2 Rose, Bankrupt Cases, 225.) But a clause of interest does not vitiate the bill. (Jamieson, 2 Rose, B. C. 225; Schaw, 1743, M. 1423; Sword, M. 1433; Dowan v. Dibdin, 1 R. and M. 382.)

1522. *Date*.—The Mercantile Law Amendment Act of 1856 (19 and 20 Vict., c. 60, sec. 10) provides, that where a bill or promissory note is issued without date, it shall be competent to prove by parole evidence the true date at which the bill or note was issued; provided that summary diligence shall not be competent on a bill or note issued without a date.

1523. *Subscription*.—Bills and notes may be subscribed by procuration; but the power, as Mr Bell observes, "is a dangerous one, and ought not only to be granted with reserve, but acted upon by third parties very scrupulously." (Bell's Com., 5th ed., p. 399.) It is commonly granted by letter or power of attorney; but in this respect the practice of merchants has introduced very great looseness. In accordance with this practice, both the common courts in England and the House of Lords have held that the power of procuration could not only be conferred verbally, but might be inferred from circumstances; and a Scotch *dictum*, in which the necessity of a special mandate was

insisted on, was commented upon by Lord Chancellor Eldon as an error. (*Davidson v. Robertson*, July 4, 1815, 3 Dow, p. 218.) But this doctrine is applicable only to mercantile cases. Unless the person who signs by procuration expresses his representative character, he will be personally liable. (Connel, 1782, M. 1485; Douglas, 1800, M. Bill Ap. 15; Clark, 1823, 2 S. 210; Webster, June 3, 1848, 10 D. 1133; Chiene, 20th July 1848, 10 D. 1523.)

1524. *Subscription by Initials or by Mark* is not sufficient to constitute a valid bill or note, whatever may be the value of the document so subscribed, as a ground of action, or of a claim in bankruptcy. (Ersk. iii. 2. 26 (Note 64); Bell's Prin. 323; 1 Bell's Com. 390.) If the name be written on a piece of blank paper properly stamped, the writer will be held to be the drawer or acceptor, as the case may be, of the bill afterwards written above his name. (Ersk. iii. 2. 28 (Note 69); Bell's Com. i. 390; Bell's Prin. 313 and 321; *Smith v. Taylor*, 27th Feb. 1824, 2 S. 755; *Lyon v. Butter*, 7th Dec. 1841, 4 D. 178; *Grassick v. Farquharson*, 8th July 1846, 8 D. 1073.) The drawer's name in the body of the bill, in his own handwriting, is equivalent to his subscription. (Bell's Prin. 311; *A. v. B.*, July 1750, M. 1444; *M'Bean v. M'Pherson*, 22d Nov. 1806, Hume, p. 57; Ferguson, 1758, M. 1443.)

1525. When a blank is left in the document, or the sum is so written as to be capable of alteration without detection, and where such alteration has been effected, a third party, deceived in consequence of the negligence of the drawer, will be entitled to recover from him the whole sum by summary diligence. But if the alteration has been made in so clumsy a manner as not to deceive a person of ordinary vigilance, this fact will form a good defence. (Bell's Com., vol. i. (Shaw's ed.), p. 308, and authorities given; Menzies, p. 347, and cases there cited.)

1526. *Minors*.—The rules for the protection of minors (*ante*, p. 66) are so far modified in relation to their bills and notes,

that they are effectual to a *bona fide* holder for value paid, or where they are granted in the line of a trade in which the minor is actually engaged. (Craig v. Grant, 5th July 1732, M. 9035; Macdonald, 1789, M. 9038.)

1527. *Married Women*.—As the personal obligations of a wife are null, she cannot grant or indorse bills. Bills payable to a wife belong to her husband, and may be indorsed by him. (Sym, 25th Nov. 1825; Jeffrey, 28th June 1826; Walker, 4th Dec. 1827; Earl of Strathmore, 19th June 1832.)

1528. *Recourse*.—The act of drawing a bill implies an obligation that it shall ultimately be paid, and the person in whose favour it is drawn has thus recourse on the drawer should the drawee fail to accept or to pay. (As to obligations of indorsee, v. *infra*, p. 271.)

1529. *Acceptance* must now, in accordance with 19 and 20 Vict., c. 60, sec. 10, be in writing on the bill itself,—verbal acceptance conferring none of the privileges of an accepted bill; but verbal acceptance, or even a promise to accept, will complete the transfer of the drawer's debt to the payee, though such acceptance would probably be ineffectual in a competition with creditors.

1530. Refusal to accept, as evidence of notice, if the drawee is possessed of a fund, will give the payee a right to the fund as assignee. (Bell's Com. 398; Bell's Prin. 315; Gordon v. Anderson, 9th Dec. 1712, M. 1490; Stewart, 1724, M. 1463; Mitchell, 1734, M. 1464; Kippen and Co., 1768, M. 1495; Spottiswoode, 1778, M. 1495.)

1531. Acceptance may be by procuration; but the holder of the bill is not bound to take such acceptance without seeing the warrant. (Bell's Com. 399; Bell's Prin. 321; Attwood v. Mannings, 1827, 7 Barn. and Cress. 278.)

1532. The acceptance of a partner binds the firm, unless the holder of the bill was aware that it had reference to the partner's

private affairs. (Bell's Com. 400; Bell's Prin. 354 and 355; Dewar v. Miller, 14th June 1766, M. 14569; Thomson v. Liddell and Co., 2d July 1812, F. C. (opinion of the Court); Blair Iron Co. v. Alison, 13th Aug. 1855, 18 D. (House of Lords) 49; Johnston, Sharp, and Co. v. Philips, 3d Feb. 1819, reversed in House of Lords 22d July 1822, 1 Shaw's Appeal Cases 244.)

1533. *Conditional Acceptance*.—Acceptance may be to the effect that the person drawn on will pay, “when in cash, by a remittance not yet arrived,” or on the “arrival of a particular ship,” or “when goods consigned shall be sold,” etc.; and such acceptance is binding on the condition being fulfilled, not otherwise. (Stair, i. 11. 7; Bell's Prin. 317; 1 Bell's Com. 398; Thomson, 348; Milne v. Prest, Holt 181; Preison v. Dunlop, Cowp. 571; Sproat v. Matthews, 1 Term Rep. 182.)

1534. Acceptance may also be for a part only of the sum drawn for, or it may vary from the terms of the draft in the time or mode of payment. But the payee is not bound to take an acceptance qualified by these or any other conditions. (Bell's Com. 398; Bell's Prin. 320; Thomson, p. 350; Walker v. Atwood, 11 Mod. 190; Petit v. Benson, Cambab. 452; Rowe v. Young, House of Lords, July 17, 1820, 2 Bligh 391.)

1535. Acceptance “as executor,” “as cautioner,” whatever effect it may have in a question of relief, has none as against the holder of the bill. It is an absolute acceptance. (Bell's Com. 399; Bell's Prin. 318; Campbell v. Gibson, 1753, Elchies, Bell, App. 54; Sharp v. Harvey, 24th June 1808, F. C.; Macdougall v. Foyer, 13th Feb. 1810, F. C.)

1536. *Acceptance and Payment for Honour*.—To prevent the return of a bill, and the accumulation of expense, a friend or agent of the party or parties to a bill may accept it for their honour, *supra protest*. The person so accepting is liable to all

the parties, *except those for whose honour he has accepted*. Such acceptance must be under protest before a notary and witnesses, and the instrument stating the fact must be sent, without delay, to the person for whose honour the bill is accepted. In this case the bill ought to be first protested and then accepted; and the same course ought to be followed where the bill is paid for honour. (Bell's Com. 401; Bell's Prin. 322; Menzies, 334.)

1537. The holder of the bill may refuse acceptance, but not payment for honour.

1538. *Indorsement* is an order to pay the contents to a particular person, or to the bearer. If the name of the indorsee be stated, it is called a *full indorsement*; if not, it is a *blank indorsement*. In the latter case indorsation generally consists merely of the signature of the indorser,—the order to pay being implied. In either case, indorsation is not merely a transfer of the bill or note; it is likewise an obligation to indemnify the indorsee or holder, if the bill should not be paid. (Bell's Com. i. 401; Bell's Prin. 329; Menzies, 336.) Bills of lading (see Sale) are the only instruments, besides bills and promissory notes, which pass by indorsation. All other instruments, even *in re mercatoria*, require a regular assignation.

1539. Indorsation, like acceptance, may be by procuration, or by a partner for a firm, and it may also be conditional or restrictive. (Sec. 1523.)

1540. Indorsation may be either before or after the term of payment (Wilkie, 30th Nov. 1811, F. C.; Crawford v. Robertson's Trs., 30th June 1814, F. C.; Muir and Co., 1831, 9 S. 535); but after protest and diligence the bill cannot be carried by indorsement, but requires assignation. (Brown v. Ralston, 5th June 1793, Hume 40.) It is provided by the Mercantile Law Amendment Act (19 and 20 Vict., c. 60, sec. 16), that in the case of indorsation, after the period of payment, the indorsee shall be deemed to have taken the bill or note subject to all

objections or exceptions to which it was subject in the hands of the indorser.

1541. *Bank Notes* are promissory notes payable to a certain person or "bearer" on demand, and pass without indorsement. (Ersk. iii. 5. 6; Bell's Prin. 1337.)

1542. The notes of the Bank of England supply the place of coin by statutory enactment, and must be accepted; whilst those of private and joint-stock banks do so only by public consent, and may consequently be declined by an individual at pleasure.

1543. The issue of bank notes is regulated in England by 7 and 8 Vict., c. 32 (1844); and in Scotland by 8 and 9 Vict., c. 38 (1845). •

1544. *Bank Cheques*.—A cheque, check, or draft, is a written order, addressed to a banker by a person who has money deposited with him, requesting him to pay a part or the whole of it to himself, to a party named, or to the bearer. Cheques are transmissible by indorsation, and the rules for negotiating them are nearly the same with those applicable to bills and promissory notes. (See sec. 1512.)

1545. *Cross Cheques*.—As cheques, more particularly when made payable to the bearer, or order on demand, afforded facilities for crime, the system of cross cheques was introduced by the mercantile usage of England, and is now regulated by statute. With the view of preventing the cheque from being paid to any one not known at a bank, it was provided by 19 and 20 Vict., c. 25, sec. 1, that "in every case where a draft on any banker, made payable to bearer or to order on demand, bears across its face an addition, in written or stamped letters, of the name of any banker, or of the words 'and Company,' in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker."

1546. By a subsequent statute (21 and 22 Vict., c. 79), it is enacted that the lawful holder of a chequer of draft uncrossed or crossed with the words "and Co.," may cross the same with the name of a banker; that such crossing shall be a material part of the cheque, and that any person obliterating or altering it, with intent to defraud, shall be guilty of felony, but that no banker shall be responsible though he shall have paid to a person other than a banker, any cheque which does not plainly appear to have been crossed or altered.

1547. *Stamp Duties on Cheques.*—Till recently there was no stamp duty on these instruments; but by 16 and 17 Vict., c. 59, and 21 and 22 Vict., c. 20, a duty of one penny is imposed on all drafts or orders for the payment of money to the bearer on demand; drafts payable to the drawer himself, and presented by him, being now included by 23 and 24 Vict., c. 15.

1548. *Alterations and Erasures* in material parts, after the issue of the instrument, are fatal, as implying a new instrument under the Stamp Act. (1 Bell's Com. 391; Bell's Prin. 328; Menzies, 346; Bayley, 118, and cases cited; Thomson, 179; see Fleming v. Scott, 1st July 1823.) Alteration of the date, and of the term of payment, have been held to annul the bill (Menzies, 347; Murchie v. M'Farlane, 1st July 1796, 11 F. C. 530; Allan v. Young, 5th March 1800, M. "Bill Ap. No. 10;" Russel v. Macnab, 14th Dec. 1822, 2 S. 88; Armstrong v. Wilson, 2d June 1842, 4 D. 1347; Murdoch Robertson and Co. v. Lee, Rodger, and Co., 26th Dec. 1801; Bell's Com. i. 391; Hamilton v. Kinnear and Sons, 17th June 1825, 4 S. and D. 102); and the same effect will follow from an alteration of the sum, or the substitution of another drawer or indorser. (M'Lean v. Morrison, 20th May 1834; 12 S. 613; Callandar v. Kilpatrick, 10th Dec. 1812, F. C.; M'Ewan v. Graham, 21st Nov. 1833, 12 S. 110.)



1549. But where the alteration is not an essential part of the instrument, or is merely to correct a mistake, and in furtherance of the original intention,—*e.g.*, the addition of “to order” where omitted,—it will not invalidate the bill. (*Mill v. Russel*, 16th Jan. 1810, F. C.; *Beattie v. Haliburton*, 18th Feb. 1823, 2 S. 225; *Commercial Bank v. Paton*, 28th June 1837, 15 S. 1202; *King v. Creighton*, 23d Nov. 1841, 4 D. 62, affirmed 11th May 1843.)

1550. In relation to all these questions, it is important to remember that, though a fatal objection may be taken to the bill, the debt, where such exists, may be proved by evidence of goods furnished or money paid.

1551. *Stamp*.—All bills and promissory notes are liable to stamp duty; and, besides the penalty of nullity for breach of the Act, it is declared, that it shall not be in the power of the commissioners afterwards to supply the defect. Neither will the consent of parties suffice.

1552. Inland bills payable on demand, and all drafts, orders (16 and 17 Vict., c. 59), and cheques on bankers (21 and 22 Vict., c. 20, and 23 and 24 Vict. c. 15) are now liable to a duty of one penny. (see sec. 1547).

1553. Inland bills and promissory notes payable otherwise than to bearer on demand, and foreign bills, drafts, and orders, pay a rateable duty, which is now regulated by the Sched. to 23 Vict., c. 15; and unless they are impressed with the proper stamp, they possess none of the privileges of such instruments. Bills of lading pay 6d.

1554. The stamp on foreign bills applies only to bills made in Great Britain. If drawn abroad, they are not liable to the British Stamp Laws, and our courts will not enforce those of foreign countries. But if such bills are negotiated in Britain, they are liable to the British stamp duties, which must be affixed before negotiation, a peculiar stamp being provided for the purpose.

1555. *Accommodation Bills*.—Besides the proper use of bills and notes, in transmitting money, and bringing into a discountable form the price of goods sold on credit, so that the debt may at once be used as money, there is another purpose to which they have been applied,—viz., to raise money by discounting at a banker's, bill-broker's, or elsewhere, a bill to which a friend who is not a debtor lends his credit. Such bills are called *accommodation* or *wind* bills. (Bell's Com. i. 426; Bell's Prin. 346; Thomson, 356.)

1556. The understanding is, that the person for whose accommodation the bill was made, is to provide his friend with the means of paying it, or is himself to retire it; and if he acts in accordance with this understanding, the transaction is closed. Such bills are simply a "loan of credit." (Burton's Manual of Private Law, p. 327.) This mode of raising money is frequently done in consideration of a commission; and not unfrequently by means of a course of bills, drawn and redrawn at enormous expense. Persons requiring this sort of accommodation usually agree with others in the same position to draw on each other, or they exchange acceptances, or what Mr Bell characterizes as the "more dangerous instruments called *skeleton bills*." (Blank bills, already described, *ante*, p. 314.) Sometimes several houses are engaged in this traffic; and the creation of fictitious firms, the use of feigned names, the careful avoidance of the same train of discounts, are some of the many discreditable expedients to which it too frequently leads.

1557. It was held at one time, both here and in England, that where a bill was accepted for the accommodation of the drawer, he was the primary debtor, and the acceptor was creditor of the drawer on payment of the bill. But this view has been entirely abandoned as regards the bill-holder, who, whether ignorant of the original nature of the transaction or not, is entitled to hold the parties bound according as their signatures appear on the

bill. (Bell's Com. i. 426; Bell's Prin. 347; Smith's Erskine, p. 428.)

1558. The same rule applies to indorsees in an accommodation bill as to the acceptor; and the bill-holder does not lose his recourse against them, more than against the drawer, by giving time to the acceptor. (Ib.)

1559. *Presentment for Acceptance* has a double purpose: to satisfy the holder whether or not he is to rely on the payment of the debt; and, in case of non-acceptance, to preserve recourse against the drawer and indorsers. (Bell's Prin. 336; Bell's Com. i. 408; Thomson, 409.)

1560. Where the bill is drawn payable at a certain day, it is enough if it be presented on that day. (Ferguson v. Malcolm, 16th Feb. 1727, M. 1558; Jamieson v. Gillespies, 28th June 1749, M. 1579; National Bank v. Robertson, 3d Feb. 1836, 14 S. 402.)

1561. Where it is payable within a limited time after sight, recourse will be lost if it be not presented within the time which the custom of merchants in the particular line of trade has fixed as reasonable. (Falls v. Porterfield, 17th June 1766, M. 1593; Mailman v. D'Egmino, 2 H. Blackst. 565.)

1562. Presentment must be made within business hours, at the drawer's place of business or residence. If he cannot be found, the bill must be held as dishonoured. (Thomson, 415; Barclay v. Bailey, 2 Camp. 527; Morgan v. Davison, 1 Starkie 114; Parker v. Gordon, 7 East. 385; Garnett v. Woodcock, 1 Starkie 475; Chitty, 188; Nielson, 7th Feb. 1843, 5 D. 513; Bayley, 222.)

1563. *Presentment for Payment* must be either on the day of payment, or, if there be no day, within a reasonable time after receipt of the bill, and by a person holding right to the bill, or entitled to give a receipt for the money; if the bill is not presented on the last day of grace, there can be no legal

protest, and recourse is lost. (Bell's Com. i. 409; Bell's Prin. 337.)

1564. *Days of Grace* are a certain indulgence granted in addition to the terms specified. The days differ in different countries. In Great Britain *three* days are allowed, exclusive of the day on which the bill falls due. When the last day falls on a Sunday or public holiday, payment must be made on the preceding day. (Bell's Prin., 327; Smith and Payne v. Laing, 29th June 1786, M. 1612.)

1565. No days of grace are allowed on a bill payable on demand. (Bell's Prin. 327; Bell's Com. i. 410.)

1566. It has not been judicially settled in Scotland whether days of grace are allowed or not on a bill at sight. Mr Bell says that in England and on the Continent they seem to be allowed; but the point in England does not seem to have been judicially decided, probably because the usage of merchants has determined it. That usage seems to be in favour of their allowance. (Bell's Com. i. 411; Bell's Prin. 327; Chitty on Bills, 146; Thomson, 378; Byles, 7th ed., p. 177.)

1567. It has been held a sufficient presentment at a bank, if a person is there and refuses payment, though after bank hours. (Bell's Com. 412; Thomson, 437; Garnett v. Woodcock, 1 Starkie 475; see Henry v. Lee, 2 Chitty's Rep. 125.)

1568. *Protest*.—The object of protest is to establish, by a semi-judicial procedure, the fact of the acceptor's failure to accept or to pay the bill. It is performed with us by a notary public, who, before two witnesses, marks the bill with his initials, the date, and his charge. This proceeding, which is called "noting," is proved by an instrument afterwards written on stamped paper. Protest is in Scotland the sole foundation of summary execution; and in other countries, when performed in the form and by the officers which the law requires, it is the proper ground of the claim or action of recourse. (Bell's Com. i. 413; Bell's Prin. 338.)

1569. Protests for non-acceptance may be at the instance of any one having the custody of the bill ; but protest for non-payment must be at the instance of the bill-holder, or of one having authority from him. (Bell's Com. 415.)

1570. By 19 and 20 Vict., c. 60, it is provided that, in inland bills of exchange and promissory notes, notarial protests shall not be required to preserve recourse against the drawer or indorser, but it shall be sufficient to prove presentment and dishonour to the effect of preserving recourse by other competent evidence, either written or parole ; but that this provision shall not affect the necessity for a notarial protest to entitle the holder of any bill or note to proceed with summary diligence thereon. (Sec. 13.)

1571. *Notice* is indispensable in all cases to preserve recourse against the drawer and the prior indorsers. (Bell's Prin. 340 ; Bell's Com. 415 ; Menzies, 358 ; Thomson, 468.)

1572. No particular form is requisite. Whatever infers knowledge, both of the dishonour and of the resolution to claim recourse, so as to enable the drawer or indorser to take measures of precaution against the acceptor or others, is equivalent to notice. (Idem.)

1573. The notice, however, must be such as to identify the bill, and to inform the party to whom it is given of the protest, a copy of which ought to accompany it. (Bell's Com. i. 415 ; Bell's Prin. 340 ; see *Johnston v. Hog*, 21st July 1747, M. 1570.) If the notice is put into the post-office, and properly addressed, it is sufficient, though said not to have been received. (*Henderson v. Duthie*, 19th Jan. 1799, M., *voce* Bill, Ap. No. 7 ; *Stewart v. Wright*, 13th Dec. 1821, 1 S. 213 ; *Stocks v. Aitken*, 14th Nov. 1846, 9 D. 75 ; *Milligan v. Barbour*, 27th Feb. 1829, 7 S. 489 ; *Robertson v. Gamack*, 12th Dec. 1835, 14 S. 139 ; *Hawkes*, 4 Bing. 715.) Verbal notice, if clear, will suffice. (Ferguson, 25th June 1813, F. C.)

1574. Notice in the case of foreign bills must be within such time as is required by the usage and custom of merchants. (12 Geo. III., c. 72.) Every delay which can fairly be ascribed to neglect or omission, and is not justified by the circumstances of the case, will be fatal to the bill-holder's claim for recourse. (Bell's Com. 418; Bell's Prin. 340.)

1575. *In Inland Bills and Notes* the notice requisite was regulated by statute. In Scotland, by 12 Geo. III., c. 72, sec. 41, notice of dishonour was required to be given within fourteen days after the protest is taken; and the same time is fixed in England by still older statutes. But by the Mercantile Law Amendment Act, the practice in inland bills seems to be regulated in accordance with that of foreign bills, which depends wholly on usage. Sec. 14 provides that notice of dishonour of inland bills and promissory notes, in order to entitle the holder to recourse, shall be given "in the same manner and within the same time as is required in the case of foreign bills by the law of Scotland." (19 and 20 Vict., c. 60.)

1576. Notice must be given by the bill-holder himself, or by one empowered to act as his agent; and it ought to be given to every one against whom the holder means to claim recourse. (Bell's Com. 419; Bell's Prin. 340; Menzies, 358; Elliot v. Bell, 14th Feb. 1781; Thomson, 499, M. 1606.)

1577. He may, however, select any indorser, who will, of course, be entitled to his remedy against the others or the drawer. (Bell's Com. 420.)

1578. If he restricts his demand to an intermediate indorser, he will discharge the subsequent indorsers, "and also the prior, including the drawer, if that intermediate indorser do not give notice." (Bell's Com. i. 420; Thomson, 502; Henderson v. Duthie, 19th Jan. 1799, F. C.)

1579. Where a bill or note has been lost, or stolen, or fraudulently obtained, the holder, doing diligence thereon, is bound to

prove that value was given him, but such proof may be by parole evidence. (19 and 20 Vict., c. 60, sec. 15.)

1580. *Diligence*.—Bills and notes, like all other binding documents of debt, may be enforced by an ordinary action before a competent court. But when so executed as to be entitled to the peculiar privileges which belong to them, execution may proceed upon them without action,—registration in the books of a court being held equivalent to a decree obtained and recorded. (Bell's Prin. 342; Menzies, 363; Thomson, 549; 1681, c. 20.)

1581. *Prescription*.—It is a good defence against the holder of a bill, that he has not adopted measures to enforce payment within six years from the term acceptance was refused, or at which payment was due,—that is to say, the last day of grace where there is such allowance. (12 Geo. III., c. 72, made perpetual by 23 Geo. III., c. 18, sec. 55; Bell's Prin. 349 and 594; see Patrick, March 8, 1859, 21 D. 637.)

1582. Bank notes are exempted from prescription. (12 Geo. III., c. 72, sec. 39.)

1583. The prescription of bills differs from other prescriptions in this, that it is not interrupted by a marking of partial payment or of payment of interest within the six years. (Bell's Com. 395; Thomson, 639; Ferguson v. Bethune, 7th March 1811.) See Prescription.

## CHAPTER IX.

### PARTNERSHIP.

1584. The contract of partnership has its origin in the knowledge, on the part of individuals, that the resources, mental and material, which they severally possess, can be employed with greater profit in combination than separately. By the com-

munity, on the other hand, this contract is regulated and protected from the knowledge that it is positively indispensable to the prosecution of all extensive, costly, and hazardous undertakings not directly upheld by the state. The aversion to State interference, peculiar to Englishmen, has led them to bestow special attention on every form of joint enterprise amongst private persons; and, in Great Britain and America, the law of partnership, and more particularly of joint-stock companies, has, in its details, been worked out with greater care than either in ancient Rome (see Lord Chancellor Brougham in *Thomson v. Campbell's Trustees*, Feb. 14, 1831, W. and S., vol. v., p. 25) or in modern continental states.<sup>1</sup> But it may be doubted whether we have now anything in principle so good as the *Société en Commandite* of the French and our own earlier law. (Stair, i. 16. 1; Ersk. iii. 3. 18; Bell's Prin. 350; Bell's Com. ii. 611.)

1585. The subject divides itself into two branches: partnership, including joint adventure; and joint-stock companies, private and public.

1586. *Partnership Proper*.—The invariable characteristics of partnership proper are—1. The voluntary association of two or more persons for the acquisition of gain. 2. A contribution by each partner of a share of money, goods, credit, skill, industry, or other means available for the common purpose. 3. Interest on the part of each partner in the profits and losses of the concern. 4. A power in each partner to bind the company in the line of its trade. 5. A guarantee to third parties of all the engagements undertaken in the social name, to the full extent of the individual means of each partner. (Ersk. iii. 3. 18; Bell's Prin. 351; Bell's Com. ii. 621.)

1587. *Avowed and Anonymous Partnership*.—The first is carried on and known by a firm or partnership name; the latter is

<sup>1</sup> As to the advantages of the continental law of joint-stock companies, see *Joint Stock Companies*.



managed ostensibly by one individual, who is the representative of secret or dormant partners. In the latter case, as in the former, all the partners are liable for the engagements of the company. It will constitute liability on the part of an individual if he allows his name to be used on bills of parcels or invoices, or to remain over the door. But if he has taken the precautions to prevent its use, commonly adopted by merchants, he will be freed from liability though he has not taken any judicial step for that purpose. (Bell's Com. ii. 622 ; Bell's Prin. 359.)

1588. *General or Special Partnership*.—Whatever may be the private agreement between the partners, they will all be held, with regard to strangers, as partners in the general trade, unless positive notice is given to the contrary. The whole stock of the company is vested in the partners in trust, first, for payment of the company's creditors, and, second, for division among the partners according to their respective shares. (Bell's Com. 613 ; Crooks, 1779, M. 14596.)

1589. *Implied Mandate*.—Whatever may be the nature of the private contract, each partner is presumed to hold a mandate to bind the society by bill or mercantile document ; and even a fraud committed in the line of trade will be binding, to the effect of rendering the company liable in reparation of the consequences. (Bell's Com. ii. 615 ; Bell's Prin. 354 and 355 ; Menzies, 410 ; Wallace v. Campbell, 23d June 1824, House of Lords, 2 Shaw's Ap. Cases, 467 ; Blair Iron Co., 13th Aug. 1855, 18 D. 49 (House of Lords Rep.) ; Willet v. Chambers, Cowp. 814.)

1590. In written contracts there is generally a limitation of the power of signing the firm. But whatever effect that limitation may have amongst the partners, it has no effect in saving the company or the partners from responsibility to third parties ignorant of its existence. (Bell's Com. ii. 615 ; see Galway, 10 East. 264.)

1591. *Joint Responsibility*.—The company must be called in the first instance, and the debt constituted against it ; it being only in the event of its failing to pay that the partners as individuals can be called on. The partners, as private persons, are thus guarantees for the company, not proper or principal debtors ; yet a decree against, or bill by, a company, is a warrant for summary diligence against any partner. (See Taylor on difference between English and Scotch Law of Contracts, p. 142.) The responsibility of the partners in relation to each other is regulated by their contract, express or implied. (Ersk. iii. 3. 24 ; Bell's Com. ii. 619 ; Bell's Prin. 356 and 371 ; Thomson, July 2, 1812, F. C. ; M'Tavish v. Lady Saltoun, 3d February 1821, F. C. ; Dewar v. Munnoch, 23d Feb. 1821, 9 S. 487.)

1592. A private mercantile firm may hold a lease, but it cannot hold feudally as a vassal. (Bell's Com. 619 ; Bell's Prin. 357 ; Menzies, 46 and 416 ; Denistoun and Co., Feb. 16, 1808, F. C. ; see Minto v. Kirkpatrick, May 1833, 11 S. 632 ; Irvine, 15th July 1851, 13 D. 1367.)

1593. From the trust reposed by the partners in each other, a *delectus personæ* is implied, and it is therefore held that no new partner can be adopted without the consent of those already in the firm. Hence heirs, assignees, and creditors are excluded, unless it be otherwise stipulated or necessarily implied, as, for example, from the long duration of the company. (Stair, i. 16. 5 ; Ersk. iii. 3. 22 ; Bell's Prin. 358 ; Bell's Com. 620 ; Warner v. Cunningham, 24th Jan. 1798, M. 14603, affirmed, 3 Dow 76 ; Royal Bank v. Fairholme, 14th Feb. 1770, F. C.)

1594. Even where the parties have stipulated that their heirs or assignees shall be adopted in their stead, it would appear that the partners of a private company might object, on cause shown, to the partner proposed, and that the power of assigning or selling is qualified to that extent. (Bell's Com. ii. 620.)

1595. *Constitution of the Contract.*—Partnership being constituted by consent, its existence may be proved by any means which the law of Scotland admits as proof of consent. It may thus be established either—1. By a regularly tested instrument; or, 2. A less formal writing, *e.g.*, letters exchanged, minutes, articles subscribed by initials and afterwards acted upon, articles written in a ledger or other trade book; 3. By express verbal agreement; or 4. By facts and circumstances which may be proved by the parole evidence of the servants or customers of the company. (Bell's Com. 621 and 622; Bell's Prin. 361; Logie, 1697, M. 14566; Fairholms, 1725, M. 14558; Livingstone, 1775, M. 14551; Learmonth and Co., July 2, 1820, 1 Sh. Ap. Ca. 481; Bland, Jan. 11, 1825, 3 S. 419.)

1596. Where the respective shares of the partners are left doubtful in the contract, the presumption is for equality of rights and responsibility. But this is a presumption not of law but of fact, which may therefore be overcome by evidence, or by indications of a different rule having been agreed to. The question, what division would be fairly proportioned to the contributions of the parties, will in this case be sent to a jury. (Ersk. iii. 3. 19; Bell's Prin. 362; M'Whirter v. Guthrie, 14th Feb. 1822, 1 S. 319; Struthers v. Barr, 19th May 1826, 2 W. S. 153; Campbell's Trustees v. Thomson, 26th May 1829, 7. S. 650, reversed 14th Feb. 1831, 5 W. S. 16.)

1597. One person cannot make a partnership, even though he should trade under the designation of a firm, but he may be a member of several partnerships; and one company may be a partner of another company. In this case the creditors of the united company are preferable on the stock of that company to the creditors of the company entering it as partners. (Bell's Com. 625; Bell's Prin. 365; Nairn v. Forbes and Co., Nov. 25, 1795; Bertram, Gardner, and Co., Feb. 25, 1795; Notes, 1 and 2 Bell's Com., p. 625; Royal Bank of Scotland v. Assignees

of Stein, Smith, and Co., 20th Jan. 1813, F. C.; Rose, Feb. 1, 1833, 11 S. 344.)

1598. It may be stipulated that a partner is to share in the profits without sharing in the loss ; a provision which, of course, will affect only the relations of the partners amongst themselves, and will not exempt the individual so favoured from the claims of the creditors of the company. (Ersk. iii. 3. 19 ; Bell's Com. 646 ; Geddes v. Wallace, 24th July 1820, 2 Bligh's Ap. 270 ; Venables v. Wood, 8th March 1839, 1 D. 659.) A partner is not entitled to conduct a business which gives him an interest adverse to that of the partnership. (Coll-  
yer, p. 100.)

1599. *Duties of Partners.*—A partner is bound to give his personal attention and services in the company's affairs without recompense, unless it be otherwise stipulated, and this even in winding them up after dissolution. (Stair, i. 16. 7 ; Ersk. iii. 3. 21 ; Bell's Prin. 370 ; Beath, March 3, 1826, 2 W. S. 25 ; Duncan, Feb. 8, 1831, 9 S. 398.) He is bound to obey such calls as may be necessary to meet the losses and exigencies of the company. (Douglas, Heron and Co. v. Hair, 24th Jan. 1773, M. 14605.)

1600. *Duration and Dissolution.*—The duration of the contract may be fixed either expressly or by implication. Where such is the case, it can be prematurely dissolved only on cause shown, or by a majority, though even then, if opposed by the minority, the majority must prove that their grounds are rational and fair. (Ersk. iii. 3. 26 ; Bell's Com. 631 ; Bell's Prin. 366 and 372 ; Montgomery v. Forrester and Co., 17th June 1791, M. 14583 ; Barr, May 18, 1802, M. 14583 ; Marshall, Jan. 20, 1815, and Feb. 23, 1816, F. C.)

1601. If no term be fixed, it will endure till dissolved at the will of the parties. Any partner may dissolve the company ; but, in doing so, a fair and equitable discretion must be observed,

as no one will be allowed to dissolve simply to gratify his own feelings, or promote his interests to the prejudice of the other partners. (Ersk. iii. 3. 26; Bell's Com. 631 and 632; Bell's Prin. 378; see above cases, and *Peacock v. Peacock*, 16 Ves. Jun. 49; Lord Chancellor Eldon's remarks, *Featherstonehaugh v. Fenwick*, 17 Ves. Jun. 298.)

1602. It has been fixed, both here and in England, that the withdrawal of one partner dissolves the concern, and that the other partners cannot proceed with the contract, even if they should be willing to do so. This is in accordance with the rule of the civil law, "*dissociamur renunciatione*." The contract may be renewed by tacit consent, but not to the effect of binding the partners to a renewal of the original term, but only for an indefinite period to be terminated at pleasure. (Bell's Com. 631, and cases cited.)

1603. Notice of an intention to dissolve is not held to be necessary, as the reason for the step may be a suspicion that some of the partners intend to abuse their power, and notice would increase the risk. But if the dissolution has been effected from unfair or interested motives, or if the partner dissolving has needlessly occasioned loss to the firm, he will be liable in damages. (Ersk. iii. 3. 26.; see cases of *Featherstonehaugh* and *Marshall*, *ante*.)

1604. The Court, on dissolution, will, if necessary, appoint a neutral person to wind up the affairs. (Dixon, 22d Dec. 1831, 10 S. 178, affirmed 13th Aug. 1832, 6 W. S. 229; *Drysdale*, March 11, 1842, 4 D. 1061; Bell, March 11, 1857, 19 D. 704.)

1605. *Death*.—Partnership is dissolved by the death of a partner, even although a definite term of duration not yet expired has been fixed. Special stipulation alone can obviate this consequence. (Stair, i. 16. 5; Ersk. iii. 3. 25; Bell's Com. ii. 634; Bell's Prin. 375; Aiton, 1769, M. 14573, revd. Paton, ii. 283.)

1606. *Insolvency and Bankruptcy*.—Insolvency of a partner alone does not dissolve the concern, but sequestration, by which his whole rights are transferred to his creditors, does; and the same effect will follow from a private trust-deed in favour of creditors. (Ersk. iii. 3. 26; Bell's Com. ii. 634; Bell's Prin. 377; Menzies, 417; Paterson v. Grant, 12th July 1749, M. 14578; Monro, June 8, 1813, F. C.)

1607. *Incapacity and Misconduct*.—Total incapacity, as from insanity, more particularly if likely to be permanent, and misconduct, if of such a kind as is likely to prove ruinous to all concerned—as, for example, where the partner of a gunpowder manufactory has contracted uncontrollable habits of intoxication—will clearly furnish the other partners with grounds of dissolution. The minor shades of incapacity and misconduct raise points of infinite difficulty. The nearest approximation to a rule, says Mr Bell, is, that “a remedy and relief will be given only where the circumstances amount to a total and important failure in those essential points on which the success of the partnership depends.” (Bell's Com. ii. 635; Bell's Prin. 376; Sayer v. Bennet, 1784; Waters v. Taylor, 2 Ves. and Beames 303, Lords Eldon's remarks; Pollock, Dec. 10, 1811, F. C.)

1608. *Marriage of a Female Partner* is a change so important that it will form a ground of dissolution. (Bell's Prin. 374; Com. ii. 634; Nievot v. Brunaud, 4 Russ. 247.)

1609. *Change of Partners*.—A partnership is not necessarily dissolved by the adoption of new or the dropping out of old partners, if the change be made of consent, or by virtue of a provision for that purpose in the contract. By sec. 7 of the Mercantile Law Amendment Act (19 and 20 Vict., c. 60), it is provided that no guarantee, security, cautionary obligation, representation, or assurance, granted to or for a company or firm consisting of two or more persons, or to or for a single per-

son trading under the name of a firm, shall be binding on the granter in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted, or of the company or firm for which the same has been granted; unless the intention of the parties that such obligation should continue binding notwithstanding any such change shall appear, either by express stipulation or by necessary implication from the nature of the firm or otherwise.

1610. *Dissolution in Relation to Third Parties.*—No dissolution, whether by agreement, death, or bankruptcy, will discharge any one of the partners or his representatives from responsibility already incurred to third parties. Even where the retiring partner has paid to the rest as much as will meet the whole debts, it will not act as a discharge of his liability. (Bell's Prin. sec. 381; Bell's Com. ii. 638; Ramsay's Executors v. Grahame, 18th Feb. 1814, F. C.; Milliken v. Love and Crawford, 23d Feb. 1803, Hume 754.)

1611. *Notice.*—To third parties notice is requisite, even where the partnership has reached its natural term; for the public cannot be supposed to be acquainted with the terms of the contract. (Bell's Com. ii. 639; Bell's Prin. 383; Bolton v. Mansfield, 21st Nov. 1786, F. C.; Dalglish and Fleming v. Sorley, 24th May 1791.)

1612. In fixing what constitutes notice, it is necessary to distinguish between *customers* of the company and *strangers*.

1613. (1.) *Customers.*—Intimation in writing, traced to the possession of the customer or to the post-office, with a proper address, is generally requisite. But an obvious change of firm will be held to be notice; and so, also, the alteration of the cheques, or notes of a banking house, or of invoices, is good notice to creditors using them. (Bell's Com. ii. 640; Bell's Prin. 384; Jenkins v. Blizzard, 1 Starkie 418; Dunbar v. Rem-

mington, Wilson, and Co., 10th March 1810, F. C.; M'Iver v. Humble, 16 East. 169; Bertram v. M'Intosh, 13th Feb. 1822; Sawers, Feb. 24, 1815, F. C.; Padon, Dec. 21, 1826, 5 S. 175.)

1614. A *Gazette* notice alone, or accompanied by advertisements in newspapers, is not sufficient notice to customers. Sawers, *ante*; Kemp v. Allan, 17th June 1824, F. C.)

1615. (2.) *Strangers*.—As it is impossible to give special notice to all the world, the form of notice last mentioned, or any other fair and public intimation, will suffice as warning to those who have had no previous dealings with the company. A *Gazette* notice alone will not be sufficient, though by statute it is good notice of bankruptcy. Neither will newspaper advertisements suffice without the *Gazette*, which is a sort of record to which merchants and tradesmen commonly refer. (Bell's Com. ii. 641; Bell's Prin. 385; Sawers, *antea*; Godfrey, 1 Esp. Cases 371; Williams, 2 Starkie 290; Grahame, Peake's Cases 154; Thomson, Feb. 13, 1822, 1 S. 314.)

1616. Even in anonymous partnership, if known to any one person, publication is necessary. (Kay v. Mair (or Kay v. Pollock), 27th Jan. 1809, F. C.)

1617. *Notice of Death*.—The publication of a partner's death, in the ordinary obituary in the newspapers, is sufficient to save his representatives from further liabilities; and it has even been said that, "death being a public fact, all men are bound to know it. (Christie v. Royal Bank, April 6, 1841; Ross' Leading Cases, iii. 671; Aytoun v. Dundee Banking Company, 19th July 1844, 6 D. 1409.)

1618. *Winding Up*.—Partnership subsists with reference to past, after it is dissolved with reference to future transactions. It thus continues for the purpose of winding up, levying and paying debts, and calling on the partners to fulfil their engagements to the public and to each other. Where there is no



special agreement, the surviving partners have the power of winding up and the right of action for debts due to the company. If acts beyond the proper object of winding up are attempted, or the representatives of deceased partners are not satisfied with the credit or fidelity of the survivors, or if all the partners are dead, the Court will, on the application of a proper party, either interdict those who remain, or require caution, or appoint a neutral person to wind up the concern. (Ersk. iii. 3. 27; Bell's Com. 637 and 643; Bell's Prin. 387; Douglas, Heron, and Co. v. Gordon, 16th June 1792, F. C.; Douglas, Heron, and Co. v. Lowthram, 10th July 1800; Dixon v. Dixons, 22d Dec. 1831, affirmed 13th Aug. 1832, 10 S. 178, 6 W. and S. Ap. 229; Cheyne, 26th Nov. 1828, 7 S. 60; Thom, Nov. 23, 1850, 13 D. 134; Barclay, 19th Feb. 1857, 19 D. 488.)

1619. If the company, during its subsistence as such, have ordered goods, which are delivered to the partners entrusted with the duty of winding up after dissolution, all the partners are liable for the price. (Bell's Com. ii. 637.)

1620. *Rules of Accounting.*—The moment of dissolution is the moment of division of profit and loss, where that is practicable; and any partner may insist on a sale as the best criterion of the value of the property. The good-will of the business forms part of the common stock. (Ersk. iii. 3. 27; Bell's Com. ii. 645; Bell's Prin. 390; Marshall v. Marshall, 23d Feb. 1816, F. C.; M'Cormack v. M'Cubbin, 4th July 1822, F. C.)

1621. The debts being paid, each partner is allowed whatever he has advanced to the partnership, and charged with what he has failed to bring in, or has drawn out, beyond his just proportion; and the residue is then divided in accordance with the terms of the agreement, or equally, if there be no express agreement. (Bell's Com. 645; Anderson Blair v. Russel, 22d May 1828, 6 S. and D. 836.)

1622. Where the retirement of partners is contemplated, it is

common to stipulate that their interests shall be regulated by the preceding balance, and to provide that the books shall be balanced at regular intervals. In practice this is often neglected or found to be impracticable, and questions of great difficulty arise in consequence. If the company have neglected to make a regular balance, the stipulation in question will not entitle either party to go back, perhaps for years, to what may actually have been the preceding balance. In such a case the Court of Session will order a balance to be struck as at the preceding term. (Bell's Com. ii. 647; Bell's Prin. 390; Blair v. Douglas, 15th Feb. 1776, F. C., affirmed April 15, 1777, M. 14577; Monro v. Cowan and Co., 8th June 1813, F. C.; Buchanan v. Muirhead and others, 17th June 1800.)

1623. *Diligence against a Bankrupt Company.*—The creditors of a company may proceed against the common stock by all the diligence of the law; and also against the separate estates and persons of the partners, as guarantees bound each for the whole amount of the company's debts. (Bell's Com. ii. 619 and 661; Bell's Prin. 371; Thomson v. Liddell and Co., 2d July 1812, F. C.)

1624. There are two modes of extricating the affairs of a bankrupt company:—Trust-deed, and Sequestration.

1625. There is nothing peculiar in these proceedings which does not obviously arise out of the difference between a company and an individual, and reference is therefore made to the article on Bankruptcy.

1626. Where the partners of a company are bankrupt as well as the company itself, claims may be entered by the company's creditors both against the estate of the company and against the separate estates of the partners. To the estate of the company they have a right, to the entire exclusion of the separate creditors of the partners. These claims, both as to voting and ranking, are for their whole debts, undiminished by any right of claiming on the separate estates of the partners. (Secs. 61

and 66 of Bankrupt Act; Kinnear on Bankrupt Act, 2d ed., p. 78.)

1627. The trustee for the creditors of the company is entitled to be ranked in full on the estate of a partner, for debts due to the company, like an ordinary creditor.

1628. *Joint Trade*, or joint adventure, is a partnership limited to one particular voyage, adventure, or speculation. It may be entered into either by individuals or companies, or by individuals with companies, or companies with companies. To the extent to which it reaches, it differs not from partnership at common law. There is no responsibility beyond the limited agreement of the parties, but to this extent all the partners are responsible *singuli in solidum* for the engagements of the active partners. (Ersk. iii. 3. 29; Bell's Com. ii. 649; Bell's Prin. 392.)

1629. *Joint ownership* is not even a limited partnership, for there is here no agreement to share the profit and loss. It generally occurs where a purchase is made by several with a view to ultimate division, where a ship is the property of several *pro indiviso* proprietors, or where a succession has opened to several persons in common. (Bell's Com. ii. 655; Bell's Prin. 393; see Logan, May 15, 1824, 3 S. 15.)

1630. *Joint-Stock Companies*.—The leading distinction, independent of statute, between a joint-stock company and a proper partnership, consists in the shares of the former being transferable to purchasers, heirs, or creditors, without the consent of the remaining shareholders; whereas, in partnership, the adoption of a new partner is either forbidden, or allowed only with the consent of the whole members of the existing firm. The ground of this distinction is, that the affairs of a joint-stock company, being managed not by the partners as such, but by directors whom they select, there is no necessity for their reserving to themselves a choice of persons. The success of the enterprise, and the safety of the shareholders as a body, do not demand in-

telligence, industry, or even probity on the part of each of them. Money is all that they are called upon to contribute, and the money of one man is as good as that of another. All the shareholders, it is true, have an interest in the selection of prudent directors, and consequently in the character of the body by which they are selected; but this interest is not sufficient to warrant them in incurring the loss which they would certainly sustain by preventing the unrestricted sale of their shares. (Ersk. iii. 3. 28; Bell's Com. ii. 627; Bell's Prin. 397, *et seq.*)

1631. There is another very important distinction which, under certain regulations and restrictions, is now admitted by statute, but which the common law of Scotland, following that of France,<sup>1</sup> and indeed of continental Europe generally, is believed at one time to have recognised, viz.,—that the shareholders in joint-stock companies should not be responsible beyond the amount of their shares. “The very meaning of confining the trade to a joint-stock,” it was said in the case of the Arran Fishing Company, “is that each should be liable for what he subscribes and no farther” (see Report of *Stevenson v. M'Nair*, from F. C., in Morison's Dict., pp. 14560 and 14667. See also Bell's Com., Shaw's edition, vol. i., p. 239, and Story on Partnership, sec. 165, p. 270, where the above case is quoted as fixing the law of Scotland!); and the equitable principle on which the decision was founded was, that in dealing with such companies the public ought to rely on the stock actually subscribed, and not on the uncertain solvency or credit of the individual partners. Had this principle been steadily adhered to, the public would have become aware that, apart from positive stipulation, they had no guarantee beyond the stock, and false confidence and im-

<sup>1</sup> In the *Société en Commandite*, a distinction is made between the directors or managers of the company and the shareholders; the former incurring an unlimited, the latter a limited responsibility; an arrangement which offers, perhaps, the best solution of a very difficult question.—*Code de Commerce*, liv. i., tit. iii., secs. 23–28.

prudent speculation would have been discouraged more effectually, and in a manner far more in accordance with our free institutions, than by such directly preventive measures as the "Bubble Act." (Geo. I., c. 19 (1719).

1632. But though the object which has now been imperfectly attained by legislation was thus within the reach of the common law of Scotland, the principle on which it depended was not followed out. In the well-known case of the Douglas Bank (Douglas, Heron, and Co., v. Hair, July 24, 1778, M. 14605), all the partners were held to be responsible as individuals, notwithstanding that the bank, though trading under the personal firm of Douglas, Heron, and Co., could not possibly be viewed as a partnership proper. The whole subject was thus again thrown loose, and the consequence was the introduction of the English doctrines, first by implication, and latterly by express enactment.

1633. By 19 and 20 Vict., c. 47, sec. 61, it is provided that the existing shareholders shall be liable to contribute to the assets of the company to an amount sufficient to pay the debts of the company, and costs, charges, and expenses of winding up, *unless the company is limited under the statute*; in which case no contribution shall be required from any shareholder exceeding the amount, if any, unpaid in the shares held by him.

1634. The provision (sec. 2), that this Act shall not apply to persons associated for the purpose of banking or insurance, though repealed in other respects by 20 and 21 Vict., c. 49, sec. 3, was retained to the effect of excluding banking companies from the privilege of being registered as limited. But this restriction has since been removed by 21 and 22 Vict., c. 91 (2d August 1858), and joint-stock banks may now be formed on the principle of limited liability. The only special condition attached to the privilege in their case is, that the shareholders shall be subject to unlimited liability in respect of notes issued in the United Kingdom.

1635. As regards insurance offices, it is provided, by 20 and 21 Vict., c. 80, that the Joint-Stock Companies Acts of 1856-7 shall not be deemed to repeal 7 and 8 Vict., c. 110. Insurance companies are, consequently, still excluded from the privilege of forming themselves on the principle of limited liability.

1636. The present position of shareholders at common law is thus the reverse of what it was held to be in the case above mentioned; and, in place of being free from liability beyond their shares unless specially bound, they are liable to the full extent of the debts of the concern, unless exempted either by a special Act of Parliament, as in the case of the Bank of Scotland, or by availing themselves of the provisions of the recent Joint-Stock Companies Acts.

1637. *Royal Charter*.—"It has sometimes been doubted," says Mr Bell (*Com.*, vol. i., p. 240 (Shaw's ed.)), "whether this privilege can be granted by royal charter; but the Crown may create fraternities or companies for trade, and limited responsibility is not a privilege inconsistent with the common law, or with the rights of other subjects."

1638. It is believed, however, that in point of fact none of the chartered banks do possess this privilege. In the charters of the Commercial and National Banks it is expressly declared that the liability shall continue to be unlimited; whilst the charter of the Royal Bank is silent on the point. Such charters, however, unquestionably confer the ordinary privileges of municipal and other incorporations, and banks possessing them are capable of holding heritable property, suing and being sued, granting and receiving money, etc., by their corporate names, and through their office-bearers, without mention of the individual shareholders. They are, in short, distinct legal individuals.

1639. Formerly the power of the Crown to grant letters patent was confined to twenty years; but by 19 Vict., c. 3, it is

enacted that it shall be lawful to grant them to any company of more than six persons in Scotland, who were carrying on the business of banking before 9th August 1843, either for a term of years or in perpetuity.

1640. Since the passing of 7 Geo. IV., c. 67, even private joint-stock banking companies have possessed the privilege of suing and being sued in the name of their manager or other principal officer, on condition of giving up to the Stamp Office, now the Joint-Stock Companies' Registry Office (established by 7 and 8 Vict., c. 110, sec. 19), annual returns, which must be corrected during the year, of the name of the firm, and of the names of the individual members and manager.

1641. *Joint-Stock Companies Acts*.—The “Principal Act,” as it is denominated by the other statutes on the subject of joint-stock companies, is 19 and 20 Vict., c. 47 (14th July 1856). The following are its leading provisions, as amended by more recent Acts :<sup>1</sup>—

1642. Seven or more persons associated for any lawful purpose, may, by subscribing their names to a memorandum of association, and complying with the requirements of the Act as regards registration, form themselves into an incorporated company, either with or without limited liability. (Sec. 3.)

1643. If more than twenty persons shall carry on trade without registering themselves under the Principal Act, they shall be

<sup>1</sup> The following statutes have since been passed :—

1st, 20 and 21 Vict., c. 14, to Amend the Joint-Stock Companies Act of 1856 (13th July 1857).

2d, 20 and 21 Vict., c. 80, to Amend the Joint-Stock Companies Act of 1856 (25th August 1857).

3d, 20 and 21 Vict., c. 49, to Amend the Law relating to Banking Companies (17th August 1857).

4th, 21 and 22 Vict., c. 60, to Amend the Joint-Stock Companies Acts, 1856 and 1857, and the Joint-Stock Banking Companies Act, 1857 (23d July 1858).

5th, 21 and 22 Vict., c. 91, to enable Joint-Stock Banking Companies to be formed on the principle of Limited Liability (2d August 1858).

liable to penalties, mentioned in 20 and 21 Vict., c. 14, sec. 3, unless they are otherwise legally incorporated.

1644. The memorandum must contain the name of the company, the place of business, the object of the trade, the amount of capital, the number of shares, and the liability of the shareholders, whether limited or unlimited.

1645. In the case of a company formed with limited liability (called a limited company), the word "Limited" shall be the last word in the name of the company. (Sec. 5.)

1646. The memorandum shall be delivered to the Registrar of Joint-Stock Companies (sec. 13), and, when registered, shall bind the company and shareholders to the same extent as if each had subscribed his name or affixed his seal to it. (Sec. 7.)

1647. The memorandum may be accompanied by articles of association prescribing the regulations of the company, and these, when registered, shall be binding on the shareholders; but if no such regulations are prescribed, the regulations contained in a schedule annexed to the Act shall, so far as applicable, be the regulations of the company. (Sec. 10.)

1648. The Board of Trade may appoint registrars and other officers, and determine the places at which their offices shall be established. (Sec. 106.)

1649. After registration, the subscribers of the memorandum, and such persons as shall afterwards become shareholders, are a body corporate by the name prescribed in the memorandum, having a perpetual succession, a common seal, and power to hold lands.

1650. Existing companies may register themselves, subject to this proviso, that no company shall be registered as a limited company unless either a certificate of complete registration, with limited liability, under the "Limited Liability Act, 1855" (which applied to England only), has been obtained, or an assent to its being so registered has been given by three-fourths in



number and value of its shareholders, at a general meeting called for the purpose. Any existing company may, for the purpose of registration, change its name, by adding the word "limited," or do any other act that may be necessary. (Sec. 114.) Such registration does not affect the rights of existing creditors. (Sec. 116.)

1651. The list of shareholders and other documents required by the Act to be delivered to the registrar, must be verified by a declaration of the directors of the company, or any two of them, or of any two other principal officers of the company.

1652. These privileges are extended to banking companies by 21 and 22 Vict., c. 91, secs. 1 and 2, and they may now be registered as limited companies under the Joint-Stock Banking Companies Act of 1857, and the Acts incorporated therewith.

1653. But, thirty days before obtaining a certificate of registration with limited liability, notice must be given to all the customers of the bank; and, in default of such notice, liability continues unlimited to such customers.

1654. Upon compliance with the requirements of the Act the registrar certifies that the company is incorporated, and in the case of a limited company, that it is limited; and the company may then issue certificates of shares to such number and amount as may be prescribed by the memorandum, but not to any greater number or amount. The shares so issued shall be personal (moveable) estate; although a written acceptance be necessary to their transference.

1655. Every company shall keep a list of the names and designations of the shareholders, of the shares held by each, of the amount paid by each on his shares, and of the date at which each became or ceased to be a shareholder. (Sec. 16.)

1656. The register shall be kept at the office of the company, and shall be open during business hours to the inspection of any shareholder, gratis, or of any other person on payment of one

shilling ; and a copy of the whole or part of the register may be required on payment of sixpence for every hundred words. (Sec. 23.)

1657. In the case of transference, the transferer shall remain holder of the share until the name of the transferee is entered in the register book.

1658. Any limited company may, by special resolution, convert into stock any shares which have been fully paid up, on notice specifying the shares so converted being given to the registrar. (20 and 21 Vict., c. 14, secs. 5, 6.)

1659. An ordinary general meeting of the company shall be held once at the least in every year. (Sec. 23.)

1660. The directors may, when they think fit, and they shall upon a requisition in writing by any number of shareholders, holding not less than one-fifth part of the shares of the company, convene an extraordinary general meeting. (Table B., 25.)

1661. *Quorum*.—A quorum shall be ascertained thus :—If the whole shareholders do not exceed ten, five shall be a quorum ; if they exceed ten, there shall be added one for every additional five up to fifty, and one for every ten after fifty, with this limitation, that no quorum shall exceed forty. (Table B., 31.)

1662. No business, except the declaration of a dividend, shall be transacted at any meeting unless a quorum of the shareholders be present at the commencement of the business.

1663. *Votes of Shareholders*.—Every shareholder shall have one vote for every share up to ten, an additional vote for every five shares beyond the first ten up to one hundred, and an additional vote for every ten shares beyond the first hundred shares. Insane persons and minors vote by their legal guardians. (Table B., 38 and 39.)

1664. *Directors*.—The first directors shall be selected, and their number determined, by the subscribers of the memorandum. (Table B., 44.)

1665. The office of director shall be vacated by the acceptance of any other office or place of profit under the company, by bankruptcy or insolvency, or by being concerned in any contract with the company. (Table B., 47.)

1666. *Calls*.—The company may, from time to time, make such calls on the shareholders in respect of monies unpaid of their shares as they think fit. Should the shares be finally forfeited for non-payment, the shareholder shall, notwithstanding, continue liable to the company for all calls owing upon his shares at the time of forfeiture. (Table B., 15–19.)

1667. *Dividends*.—The directors, with the sanction of the company in general meeting, may declare a dividend to be paid to the shareholders in proportion to their shares. No dividend shall be payable except out of the profits arising from the business of the company. (Table B., 63 and 64.)

1668. If the directors shall declare and pay any dividend when the company is known by them to be insolvent, or any dividend, the payment of which would to their knowledge render it insolvent, they shall be jointly and severally liable for the debts of the company then existing, and for all that shall be hereafter contracted, so long as they shall respectively continue in office: But it is provided that the amount for which they shall be so liable shall not exceed the amount of such dividend, and that, if any of the directors shall be absent at the time of making the dividend, or shall protest in writing, they shall be exempted from liability. (Sec. 14.)

1669. Before recommending a dividend, the directors may set aside a reserved fund out of the profits of the company. (Table B., 65–68.)

1670. *Accounts*.—A balance-sheet shall be made out in every year, and laid before the general meeting of the company, containing a summary of the property and liabilities of the company. A printed copy of such balance-sheet shall, seven days previously

to such meeting, be delivered at or sent by post to the registered address of every shareholder. The accounts shall be examined and the correctness of the balance-sheet ascertained by one or more auditors, to be elected by the general meeting. They need not be shareholders, and must not be officers of the company. (Table B., 69-77.)

1671. Upon the application of one-fifth in number and value of the shareholders, the Board of Trade may appoint one or more inspectors to examine into the affairs of the company, and to report. (Sec. 48.) But all expenses of, and incidental to, such examination shall be defrayed by the shareholders upon whose application the inspectors were appointed. (Sec. 50.)

1672. A general meeting may likewise appoint inspectors, whose powers as to inquiring into the affairs of the company shall be the same as if they had been appointed by the Board of Trade. (Sec. 51.)

1673. *Winding up.*—The affairs of companies registered under the Act may be wound up either by the Court or voluntarily; and the provisions as to winding up shall also apply to companies under 7 and 8 Vict., c. 110, from and after the date at which they have obtained registration under the Joint-Stock Act, but not to any other companies. (Sec. 59.)

1674. (1.) *Winding up by the Court.*—A company may be wound up by the Court whenever a special resolution has been passed in a general meeting requiring the company to be wound up by the Court, or if it does not commence business within a year from its incorporation, or suspends its business for a whole year, or the shareholders are reduced to less than seven, or the company is unable to pay its debts, or finally, if three-fourths of the capital have been lost or become unavailable. (Sec. 67.) By 20 and 21 Vict., c. 14, sec. 19, the Court is empowered to adopt the proceedings already taken in a voluntary winding up, and it may also direct that such voluntary winding up shall continue

under its own supervision. Additional provisions for such cases are made by 21 and 22 Vict., c. 60.

1675. *Official Liquidators*.—For the purpose of conducting the proceedings in winding up a company, and assisting the Court therein, one or more persons shall be appointed by the Court as liquidators. Where the voluntary winding up is continued under its supervision, the Court may either appoint the voluntary liquidators to be the official liquidators, or it may appoint other or additional liquidators.

1676. *Dissolution*.—When the affairs of the company have been completely wound up, the Court shall make an order declaring the company dissolved from the date of the order.

1677. (2.) *Voluntary Winding up*.—A company may be wound up voluntarily, 1st, if the period fixed for its duration has expired; 2d, on the occurrence of any event which it has been agreed should involve a dissolution of the company; 3d, if the company in a general meeting has passed a general resolution to the effect that the company shall be wound up voluntarily. Such voluntary winding up shall not prejudice the right of any creditor to institute proceedings for the purpose of having the company wound up by the Court. (Sec. 105.)

1678. *Liquidators* may be appointed by a general meeting with duties and powers corresponding to those of official liquidators appointed by the Court. Voluntary liquidators are empowered by 21 and 22 Vict., c. 60, sec. 14, to apply to the Court for aid, either in determining questions or enforcing calls.

1679. *Criminal Prosecution of Directors, etc.*—Where an order is made for winding up a company compulsorily, or for the continuance of a voluntary winding up, if it appear that any past or existing director, manager, or public officer, or member of such company has been guilty of an offence in relation to the company for which he is criminally responsible, the Court may, on the application of any person interested in the winding up, or

of its own motion, direct the liquidators to institute and conduct a prosecution for such offence, and order the costs to be paid out of the assets of the company.

1680. And where the winding up is altogether voluntary, it shall in the like circumstances be lawful for the liquidators, with the previous sanction of the Court, to prosecute; and the expenses shall be payable out of the assets of the company in priority to all other liabilities. (21 and 22 Vict., c. 60, secs. 20 and 21.)

1681. These provisions as to winding up now apply to joint-stock companies, both limited and unlimited. (21 and 22 Vict., c. 91, sec. 5.)

*Liability of Former Shareholders.*

1682. (1.) In *non-limited* companies, any person who has ceased to be a shareholder within three years prior to the commencement of the winding up, shall be deemed, for the purpose of contributing to the liabilities, to be an existing shareholder, with this exception, that he shall not be liable in respect of any debt contracted after the time at which he ceased to be an actual shareholder. (Sec. 62.)

1683. (2.) In *limited* companies, any person who has ceased to be a shareholder within one year prior to the commencement of the winding up, shall be a shareholder for the same purposes.

## CHAPTER X.

## OF CAUTIONARY OBLIGATIONS.

1684. A cautionary obligation is a secondary engagement, by which he who enters into it binds himself, failing the principal obligant, to fulfil the primary obligation. (Stair, i. 17. 3; Ersk. iii. 3. 61; Bell's Com. i. 347; Bell's Prin. 245.)

1685. Previous to the passing of the Mercantile Law Amendment Act (19 and 20 Vict., c. 60), it was customary to distinguish between proper and improper cautionary. *Cautionary proper* was where the cautioner was bound avowedly as such; *improper cautionary* was where both cautioner and principal were bound as principals. According to the present law, cautionary proper can exist only as the result of positive stipulation, under the proviso attached to the 8th section of the statute above referred to, which enacts that "nothing herein contained shall prevent any cautioner from stipulating, in the instrument of caution, that the creditor shall be bound, before proceeding against him, to discuss and do diligence against the principal debtor."

1686. Cautionary obligations are generally undertaken from motives of friendship, and are consequently gratuitous; but it is not uncommon for them to be entered into in consideration of a premium paid. (Bell's Prin. 246; see King, 1711, M. 9461.)

1687. The existence of a consideration has always been optional in Scotland; and the rule of our law in this particular has been adopted into that of England, by 19 and 20 Vict., c. 97, sec. 3. (Bell's Com., Shaw's edition, vol. i., p. 268, note.)

1688. Where a premium is stipulated, the contract becomes an insurance of solvency or honesty; and associations have been formed, both here and in England, for the purpose of under-

taking as a speculation to guarantee the good conduct of parties employed as public or private officers. (See Guarantee Association.)

1689. The tendency of the decisions in the Courts, both here and in England, of recent years, has been to require greater strictness than formerly in the constitution of cautionary obligations ; and latterly the Legislature itself has stepped in with the same object.

1690. By the Mercantile Law Amendment Act (1856) (19 and 20 Vict., c. 60, sec. 6), it is enacted that all cautionary obligations, and all representations and assurances, shall be in writing, and shall be subscribed by the person undertaking or making them, or by some person duly authorized by him, otherwise the same shall have no effect.

1691. A cautionary obligation may be dependent on a condition, in which case it is not effectual unless the condition be complied with. (Bell's Prin. 250 ; Culcreugh Cotton Co., Nov. 21, 1823, 2 S. 513 ; Blair, 1836, 14 S. 1069 ; Paterson, March 9, 1844, 6 D. 987.)

1692. The cautioner is in general entitled to plead every defence which was competent to the principal debtor ; and the extinction of the principal obligation discharges the accessory one. (Ersk. iii. 3. 64 ; Bell's Prin. 251 ; Menzies, 211 ; Johnston, 1680, M. 2076 ; Nimmo, 1700, M. 2076 ; Innes, 1728, M. 2079 ; Halyburton, 1735, M. 2073.) Moreover, the discharge of one cautioner, consented to by the rest, is a discharge to all. (Mercantile Law Amendment Act, sec. 9.)

1693. *Discussion.*—Cautioners bound prior to the Mercantile Law Amendment Act, 21st July 1856, are entitled to insist that the creditor shall first call on the principal debtor, and in law language *discuss* him ; and that, even in the case of his failing to satisfy the obligation in full, the creditor shall give him (the cautioner) the benefit of such portion of it as he did discharge.



(Stair, i. 17. 4 ; Ersk. iii. 3. 61 ; Bell's Com. i. 347 ; Bell's Prin. 252.)

1694. Discussion imports not merely a demand for payment, but enforcement of it, to the full extent which the circumstances of the principal debtor admit of. (Brisbane, 1662, M. 3588.) Discussion will be held to have taken place if the principal debtor has left the country, leaving no effects behind him, or has become bankrupt. (Bell's Prin. 253 ; Elams, Dec. 7, 1757, M. 2110.)

1695. Cautioners bound subsequent to the date of the Mercantile Law Amendment Act, have no right of discussion (sec. 8) unless expressly stipulated for.

1696. The cautioner is entitled to an assignation of the debt and diligence, and on satisfying the creditor, comes into his place, and may proceed as principal creditor. (Ersk. iii. 3. 68 ; Bell's Com. i. 348 ; Bell's Prin. 255 ; Lesly, 1665, M. 2111 ; Erskine v. Manderson, 14th Jan. 1780, M. 1386 ; Lowe v. Greig, 17th Feb. 1825, 3 S. 543 ; Stewart v. Bell, 31st May 1814, F. C.)

1697. He may also take legal measures for his relief against the possible consequences of the failing condition of the principal debtor. (Ersk. iii. 3. 65 ; Bell's Prin. 255 ; Thomson, Jan. 19, 1627, M. 2113 ; Kinloch v. M'Intosh, June 13, 1822, 1 S. and B. 419 ; Simpson, Feb. 23, 1826, 4 S. 492 ; Gilmour, Dec. 11, 1832, 11 S. 193.)

1698. The cautioner possesses a lien over any debt which he owes to the principal debtor, and may retain it for his relief. (Bell's Com. ii. 123 ; Bell's Prin. 1454 ; Town of Aberdeen, 1709, M. 2570 ; Brough, 1793, M. 2585.)

1699. *Co-Cautioners* are entitled to mutual relief, whether their obligation be embodied in one or in several deeds. (Ersk. iii. 3. 68 ; Bell's Prin. 271 ; Walker, March 3, 1830, 4 W. S. 40 ; Clarke, July 7, 1830, 8 S. 1025 ; Low, Feb. 8, 1831, 9 S. 411.)

1700. Where a co-cautioner seeks relief against the others,

he must communicate the benefit of any deduction or ease which may have been allowed him in paying the debt, and also, in the general case, of any security which he may hold over the estate of the principal. (Ersk. iii. 3. 70; Bell's Com. i. 349; Bell's Prin. 270; Nicol v. Doig, June 16, 1807; Lawrie v. Stewart, 6th June 1823, 2 S. 368; Coventry v. Hutcheson, 16th June 1830, 8 S. 924.)

1701. *Division*.—Although co-cautioners are each ultimately liable for the whole debt, they are liable only for their several proportions so long as the others are solvent, provided they have not expressly renounced that benefit. (Ersk. iii. 3. 63; Bell's Prin. 267; Drummond, Feb. 3, 1697, M. 12339; Smollet, Feb. 21, 1793, M. 12354.) The law of division does not seem to be affected by the Mercantile Law Amendment Act; and it will therefore still be necessary, where there are more cautioners than one, not bound jointly and severally, that all should be proceeded against.

1702. If the creditor, without the cautioner's consent, discharge the principal debtor, or any one cautioner, it is a discharge to the other cautioners also; and the same is the case if he accept a composition, thereby altering the cautioner's security and increasing his risk. Cautioners for a firm are not bound after any change of the firm, unless, by express stipulation, or by necessary implication, it appear that he is bound notwithstanding the change. (19 and 20 Vict., c. 60, secs. 7 and 9.)

1703. The neglect by the creditor of measures proper or necessary for the common interest, will furnish the cautioner with a defence against liability. In this way he may be freed by the creditor's abandonment of diligence. (Ersk. iii. 3. 66; Bell's Com. i. 361; Bell's Prin. 263; M'Millan, Jan. 21, 1629, M. 3390; Anderson, May 25, 1811, F. C.; Wallace, Jan. 13, 1825, 3 S. 304; Buchanan v. Douglas, 3d Feb. 1853, 15 D. 365, affirmed 16th March 1855, 18 D. 11.)

1704. But, on the other hand, the cautioners are bound to look to the condition of the debtor. Even without paying up the debt, which is always in their power, they may make use of inhibition, adjudication, or arrestment of the debtor's effects in security, and thus protect themselves against the consequences of his impending insolvency. (See sec. 1697.)

1705. The cautioner is not freed by the creditor merely forbearing to enforce payment, unless he agree to "give time" to the debtor in the technical sense—that is to say, beyond the limits of the original obligation—and by virtue of that agreement tie up the cautioner from the remedy he might otherwise have had. (Bell's Prin. 262; *Alexander v. Gordon*, Dec. 6, 1671, M. 2089; *Hume*, Jan. 12, 1830, 8 S. and D. 295; *Macartney v. Mackenzie*, 4th June 1830, reversed 23d Sept. 1831, 8 Sh. 862, 5 W. and S. App. 504; *Mactaggart's Representatives v. Watson*, 24th Jan. 1834, reversed 16th April 1835, 12 Sh. 332, 1 Sh. and Macl. App. 553; *Creighton v. Rankin*, 6th Feb. 1838, affirmed 26th May 1840, 16 S. 447, 1 Rob App. 99; *Morison v. Balfour*, 16th Feb. 1849, 11 D. 653; *Richardson v. Hardy*, 29th March 1853, 15 D. 628; *Forsyth*, Feb. 8, 1859, 21 D. 449.)

1706. *Prescription*.—Cautionary obligations prescribe in seven years (*ante*, p. 261), by stat. 1695, c. 5. In order to have the benefit of the Act, the cautioner must appear in the bond expressly as cautioner; or, if he appear as co-obligant, it is necessary that, at the time of settling the transaction, the principal debtor's obligation to relieve his co-obligant should be intimated to the creditor. (Ersk. iii. 7. 22–24; Bell's Com. i. 356; Bell's Prin. 600; *Ross v. Craigie*, 11th Dec. 1729, M. 11014; *Douglas, Heron, and Co. v. Riddock*, 20th Nov. 1792, M. 11032; *Yuille v. Scott*, 27th Nov. 1827, 6 S. 137; *Monteith v. Pattison*, 3d Dec. 1841, 4 D. 161.)

1707. This notice must be notarial or judicial, mere private

knowledge, unless acknowledged in writing by the creditor, not being sufficient. (*Bell v. Herdman*, 14th Feb. 1727, M. 11039; *M'Ranken v. Shaw*, 24th Feb. 1714, M. 11034; see *Drysdale v. Johnston*, 25th Jan. 1839, 1 D. 409.)

1708. *Exceptions*.—Cautioners *ad facta præstanda* have not the benefit of the act (*Robertson v. M'Kinlay*, 3d Dec. 1736, M. 11010); nor judicial cautioners (*Hope v. Fowlis*, 4th Feb. 1715, M. 11009; *Kerr v. Bremner*, 5th March 1839, 1 D. 618); nor cautioners in marriage-contracts (*Stewart v. Campbell*, July 1726, M. 11010); or for the discharge of an office (*Strang v. Fleet*, 5th Jan. 1709, M. 11005); or in a bond of relief (*Bruce v. Stein*, June 26, 1793, M. 11033); or for the payment of a composition on bankruptcy (*Bell's Com.* i. 358; *Cuthbertson v. Lyon*, May 23, 1823, 2 S. D. 330). To this enumeration may be added the case in which the term of payment is beyond the seven years from the date of the bond; that in which a collateral obligation separate from the principal's is undertaken (*Wilson v. Tait*, 21st July 1840; *Robinson's Appeal Cases*, i. 137), and where a letter of guarantee is granted in a mercantile transaction (*ibid.*). As a general rule, the statute will not be extended to a state of matters not expressly provided for. "Upon principle and authority," said Lord Chancellor Cottenham, "the statute is to be strictly construed, and its provisions not extended beyond the cases specified. . . . There is no room for the administration of any equity under the statute." (*Wilson v. Tait*, *ut supra*.)

1709. *Cautioners for a Cash Credit*.—In all mercantile communities, bankers and capitalists have been in the habit of advancing money to merchants and manufacturers on the security of their friends, and thus enabling them to extend their transactions beyond the limits of their own capital. But there is a peculiar form of credit which the Scottish banks from the first have been in use to grant, which, in point of convenience at least, possesses

advantages over the bill transactions which supply its place in other countries, and by which it is believed that the trade of Scotland has been greatly advanced.

1710. "A cash credit of this description," says Professor Bell (*Com. i.* 367), "is an undertaking on the part of a bank to advance to an individual, or to a partnership, on security, such sums of money as may from time to time be required, not exceeding on the whole a certain definite amount, to be repaid, and a continual circulation kept up by the replacing in the bank of funds as they come in." "Whoever has a credit of this kind," says Adam Smith, "and borrows a thousand pounds upon it, for example, may repay this sum piecemeal, by twenty and thirty pounds at a time, the company discounting a proportionable part of the interest of the great sum from the day on which each of these small sums is paid in, till the whole be in this manner repaid." It is the latter feature of the transaction, the constant reduction of the liability of the trader on each repayment, that is peculiar to Scottish banking.<sup>1</sup>

1711. The practice of the banks is to permit the person having this species of floating transaction occasionally to exceed, to a certain limited extent, the amount of his credit; the bank, of course, in this case running the whole risk of the excess.

1712. The security for such a credit is a bond with cautioners, usually two in number, for repayment on demand of the sums

<sup>1</sup> "Credits of this kind are, I believe, commonly granted by banks and bankers, in all different parts of the world. But the easy terms upon which the Scotch banking companies accept of repayment are, so far as I know, peculiar to them, and have perhaps been the principal cause, both of the great trade of those companies, and of the benefits which the country has received from it."—*Wealth of Nations*, B. ii. c. ii. "It has since been ascertained that the amount of the notes of the Scotch banks in circulation, issued by means of cash credits, bears but a small proportion to those that are issued in the discount of bills, so that the public, and not the banks, would seem to be the chief gainers by this form of credit."—*Ibid.*, M'Culloch's ed., vol. ii., p. 42, note.

advanced, with interest upon each issue from the day on which it is made. Interest at a lower rate than that demanded on the terms advanced is paid by the bank on the sums deposited, the difference between the two being the banker's profit.

1713. Heritable security is sometimes given, though bankers generally decline it on the ground that it cannot be made immediately available.

1714. The obligation, when personal, is generally undertaken by the principal and cautioners "conjunctly and severally," by which means the bond is protected from the septennial prescription, and the bank, in bonds dated prior to the Mercantile Law Amendment Act, freed from the necessity of "discussing" (*ante*, p. 353) the principal before coming on the cautioners. In all cases occurring subsequently to the passing of that Act (July 1856), the benefit of discussion is taken away. (19 and 20 Vict., c. 60, sec. 8.)

1715. On payment by the cautioners, the bank must assign to them whatever securities they hold from the principal. (See *M'Gilvray*, 10th June 1826.)

1716. *Termination of the Obligation*.—The cautioners, by simple notice to the bank, may free themselves from responsibility emerging subsequent to the date of such notice; but unless this be attended to, they and their representatives will remain indefinitely liable. (Bell's Com. i. 369; *Commercial Bank of Aberdeen v. Callender*, 4th Feb. 1801, Hume 88; *University of Glasgow v. Miller*, 18th Nov. 1790, M. 2106; *Paterson v. Calder*, 5th July 1808, M. *voce* Society Ap. No. 4; *Dudgeon v. Laing*, 1st Dec. 1813; Hume 102; *Morrice v. Scott*, 19th Feb. 1831, 3 D. and A. 557; see *Wyllie v. Fiddes*, 13th Dec. 1853, 16 D. 180.)

1717. *Cautioners for Agents, Officers, etc.*—Cautionary obligations are often undertaken in behalf of persons in situations where the engagements and liabilities are prospective.

1718. In order that such an engagement may be binding, it is indispensable that the nature and extent of the liability shall be fairly disclosed to the cautioner. But while the cautioner must not be exposed to the danger of any situation or transaction not in his contemplation at entering into the contract, he is not entitled to withdraw without giving due notice, and allowing reasonable time for a new arrangement. (Bell's Prin. 287 *et seq.*; Bell's Com. i. 367; Smith, remitted from House of Lords, 1829, 7 S. 244.)

1719. It will depend on the expressions used in the bond whether its effect is to be retrospective as well as prospective; but the *presumption* will always be that it is prospective merely, and very clear words will be necessary to make the cautioner liable for past dealings. (Bell's Prin. 289; Bell's Com. i. 366; Kinnear, 1776, 3 B. *sup.* 102; Mags. of Edinburgh, 1766, Hailes 109; Smith, *antea*; Dykes, June 3, 1825, 4 S. 70.)

1720. The creditor is bound to exercise a certain vigilance; and he is not at liberty to sanction any departure from the terms of the contract, or from the fair line of employment, or any material change in the arrangements which may prejudice the cautioner, without disclosing it. (Bell's Prin. 288; Allan v. Paterson, June 17, 1633, M. 2088; Scott v. Campbell, Feb. 14, 1834, 12 S. and D. 447; More's Notes on Stair, 109; Bonar v. Macdonald, 16th July 1847, 9 D. 1537, affirmed 9th Aug. 1850; Bell's App. vii. 379.)

1721. A cautioner has thus been freed from responsibility for a factor on an estate where the creditor neglected to insist for an annual settlement of accounts, which was stipulated for as a condition of the engagement; and many similar instances have occurred. But mere neglect, unless very gross, or partaking of a fraudulent character, will not relieve the cautioner. (Bell's Com., Shaw's ed., i. 289; Leith Banking Co. v. Bell, 12th May 1830, affirmed 1st Oct. 1831, 8 S. 721, and 5 W. and S. Ap.

703; *Thistle Friendly Society v. Gardyne*, 17th June 1834, 12 S. 746; *Duncan v. Porterfield*, 13th Dec. 1826, 5 S. 111; *Forbes v. Welsh*, 10th June 1829, 7 S. 732; *Pringle v. Tate*, 17th Nov. 1832, 11 S. 47; *M'Tagart v. Watson*, 16th April 1835, 12 S. 332, 1 S. and M'L. 553; *Falconer*, 8th March 1843, 5 D. 866; *Biggar*, 19th Nov. 1846, 9 D. 78.)

1722. The principal object of the associations already mentioned (sec. 1689) is to guarantee the integrity of managers, clerks, collectors, receivers, and the like.

1723. As regards Government servants, it is enacted by sec. 55 of the British Guarantee Association Act (17 and 18 Vict., c. 216), that the guarantee of the association may be taken in lieu of the security required by any statute, rule, or regulation now in force, from persons in public offices and employments. The like guarantee may be taken in lieu of security required from persons connected with the administration of the poor laws in England and Ireland (sec. 58), or from any officer of a savings' bank, friendly society, law society, benefit building society, or Government annuity society (sec. 62). The association also issues bonds for factors, tutors, and curators, in terms of sec. 27 of Pupils' Protection Act, by authority of the Court of Session; for trustees on sequestrated estates, in terms of sec. 72 of the Bankruptcy (Scotland) Act, 1856; and also for officials under Masters of Chancery in England.

1724. *Cautioners for a Messenger-at-arms* bind themselves "for the damage, interest, and expenses which the lieges shall sustain through the negligence, fraudulent or informal execution of the messenger." Under the term "lieges" are included not merely the employers of the messenger, but all those against whom he has committed any fault in the discharge of his office as messenger, but not when acting as an agent, in which capacity messengers are sometimes employed. (*Bell's Com.* i. 365; *Bell's Prin.* 296; *Grant v. Forbes*, 8th July 1758, M. 2081, *affd.* March 7,



1759; Kennedy, Dec. 13, 1821, 1 S. 190; Cullen, 27th Jan. 1852.)

1725. The obligation, says Mr Bell, is one "of very great responsibility, considering the infinite delicacy and the importance of the acts which a messenger has to perform" (Bell's Com. i. 365); and, on the ground that this responsibility cannot be limited to any specific sum in money, it has been refused by the Guarantee Association.

1726. *Caution for a Bank Agent*, though an obligation of great delicacy, and unless limited to a particular sum of great extent, is governed by the ordinary rules of cautionary already explained. (Bell's Com. i. 362; Bell's Prin. 290; Smith v. Bank of Scotland, H. of L., 1 Dow, 272; Thomson, Jan. 29, 1822, reversed, H. of L., June 11, 1824; Shaw's Appeals, ii. 316; Leith Bank, May 12, 1820.)

1727. *Judicial Caution* is of two kinds,—for appearance and for payment.

1728. If a creditor swears that his debtor is meditating flight (in meditatione fugæ), he may obtain a warrant for his apprehension; and on the intention to fly being proved, he may compel him to find caution that he will abide the judgment of a court (judicio sisti). (Bell's Com. i. 380; Bell's Prin. 273.)

1729. The ordinary form of the bond of caution for this purpose is, that the debtor shall appear and answer to an action for the debt, if brought against him within six months.

1730. The second kind of judicial caution is by bond of presentation, and is granted when a creditor is about to execute personal diligence, or has already done so, and grants an indulgence, on the cautioner binding himself that the debtor shall be forthcoming at an appointed time, otherwise he himself will pay the debt. The object of the cautioner's interposition is to protect the debtor from imprisonment, and allow him time to settle

the debt. (Bell's Com. 385 ; Bell's Prin. 277 ; see Chaplin, Feb. 5, 1842, 4 D. 616.)

1731. *Caution in a Suspension or Advocation*, is a mode of staying the immediate execution of a decree, without endangering the ultimate rights of the party in whose favour it has been granted. (Bell's Com. i. 385 ; Bell's Prin. 276 ; Buchanan, Feb. 3, 1853, 15 D. 365.)

1732. The terms of a bond of caution in a suspension are, "that the suspender shall make payment to the charger, or to any other person to whom payment shall be ordained to be made, of the principal sum, etc., as contained in the decree and charge for payment, in case it shall be found by decree of the Court of Session that he ought so to do after discussing the suspension."

1733. The bond of caution in advocations is, "that the advocator shall make payment to A, or to any other person, of the expenses incurred in the inferior court, and of such expenses as may be incurred in the Court of Session, in case it shall be found that he ought so to do." (Bell's Com. i. 297, Shaw's ed.)

1734. *Juratory Caution*.—On a satisfactory proof of poverty being offered, an inferior judge is entitled to grant leave to advocate on what is called *juratory caution* ; that is to say, on the advocator or suspender lodging in the hands of the clerk of court an inventory of his whole possessions, with a disposition in security in favour of the respondent of any heritage which may belong to him, and an assignation of his debts and other moveable rights.

1735. By 13 and 14 Vict., c. 36, sec. 34, it is enacted, "that where any note of advocation shall be presented on juratory caution, it shall be incumbent on the advocator to make immediate application to the lawyers for the poor, for a report that he has a *probabilis causa litigandi* ; and if the advocator shall fail to make such application, or if the lawyers for the poor shall, upon such application, report their opinion that no *probabilis causa*

*litigandi* has been established, the advocacy shall be dismissed, with expenses, unless full caution be forthwith offered and found in common form."

1736. The caution *judicatum solvi*, in maritime actions, is abolished by 13 and 14 Vict., c. 36, sec. 24.

## CHAPTER XI.

### OF INSURANCE.

1737. Insurance is an engagement by the insurer, in consideration of a specified sum advanced, or of a periodical payment made by the insured, called a *premium*, to indemnify him to a certain extent for such losses as may occur to his property from contingencies which are specified or understood. The arrangement forms a means of security, (1.) against the dangers of the elements or of the enemy, to which ships or goods are exposed at sea; (2.) against the danger of fire, to which property of all kinds is liable at land; and (3.) against loss to the insurer from the death of others, or to his family or creditors from his own.

1738. There is no contract known to the law of which the benefits, in the general case, are more indisputable; for, on the one hand, the insurer, whilst he divides his loss with others, earns large profits on the average of his transactions; and, on the other hand, the insured is protected from losses which, to an individual, would involve utter ruin. It has been well remarked by our great authority in mercantile law, that "the obvious necessity of some such refuge from disaster amidst the perils of trade, and the impracticability of proceeding without this expedient, now that it is known, afford unquestionable proofs of the narrow limits of ancient commerce, in which insurance was not practised." (Bell's Com. i. 473.)

*Marine Insurance.*

1739. The persons who undertake risks on ships, or goods on board of them, are termed *underwriters*, from their writing their names under the policy or instrument by which they respectively become liable. The transaction is commonly effected by a middleman, or broker as he is called, whom capitalists, on the one hand, empower to incur risks for them, and to whom the merchant or shipowner, on the other hand, applies when he wishes to insure.

1740. The broker by this means is placed in a position which enables him to complete the transactions without delay. "The broker," says Mr Burton, "is in the situation of debtor and creditor with both parties. To the credit of the underwriter he puts down premiums, which he credits as cash, undertaking the risk of recovering them; and in periodical accounts he may balance against these, returned premiums and losses. Against the insured he debits the premium, and credits an insured loss or a return premium." (Burton's Manual, 436; and Bell's Com., Shaw's ed., i. 494.)

1741. There can be no insurance where there is no interest, though it is not necessary that it be specified in the policy (Bell's Com., Shaw's ed., i. 477); insurances, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the insured," being suppressed by an Act of early date. (19 Geo. II., c. 37, sec. 1.) But an insurable interest need not be a direct right of property; it may consist of an expected profit or freight, or other interest in the ship. Seamen's wages cannot be insured, because "it is one object of all maritime laws to prevent the desertion of seamen, and interest them in the preservation of the ship." (Arnould on Marine Insurance, i. 258. Edition, 1857.) This prohibition extends to the mate and all inferior officers, but not to the captain or master.

1742. On the principle that immoral contracts are null, no insurance will be given effect to where the contract involves a breach of law. (Marshall, 5, *et seq.*)

1743. The risks to which marine insurance commonly applies are those of—1<sup>st</sup>, Loss by the sea; 2<sup>d</sup>, by fire; 3<sup>d</sup>, enemies; 4<sup>th</sup>, pirates; 5<sup>th</sup>, arrests by kings or states; 6<sup>th</sup>, “barratry,” or fraudulent and illegal acts by the master and mariners; 7<sup>th</sup>, jettison or jactus, *i.e.*, the casting overboard of parts of the cargo, or of the guns, stores, etc., for the common safety. (Bell’s Com., Shaw’s ed., 473, 485.) Barratry does not include bad stowage, exposure to wet, theft, etc. (Bell’s Com., Shaw’s ed., 478.)

1744. *Policy*.—The only legal evidence of the contract is a policy, written on stamped paper. (The duties are given in 7 and 8 Vict., c. 21.)

1745. It is usually preceded by a slip, which is merely a jotting or memorandum, to which the underwriters subscribe their initials. This slip cannot be received as evidence in contradiction to the policy. (Bell’s Com., Shaw’s ed., 473.) As to its effect before the policy is completed, Mr Arnould says, “A memorandum of insurance, embodying an agreement to execute a regular stamped policy, and acknowledging the receipt or accompanied by the payment of premium, may be enforced, at all events, in courts of equity, or in courts possessing a mixed legal and equitable jurisdiction, like the Court of Session in Scotland. In such cases, however, the memorandum is available not as in itself constituting a legal contract of insurance, but only as an agreement to execute such contract.” (Arnould on Marine Insurance, p. 52; and Lord Denman, in *Mead v. Davidson*, 3 Ad. and Ell. 303.)

1746. Like other instruments *in re mercatoria*, a policy of insurance does not require to be subscribed according to the statutory formalities required in the subscription of probative deeds. No witnesses are required. (Bell’s Com., 5th ed., i. 606.)

1747. Parole evidence will not control the popular meaning of the words of a policy "unless it establish a usage, which, in mercantile affairs, and when not inconsistent with law, controls the construction of all policies." (Bell's Com., Shaw's ed., 474 ; Robertson, 4 East. 135 ; Hunter v. Leathby, 10 Barn. and Cress. 871.)

1748. The policy bears the receipt of the premium, and it is therefore presumed to be paid. (Bell's Com., 5th ed., 600.)

1749. Insurance being a contract of good faith, misrepresentation, false insinuation, and concealment of facts, materially affecting the risk, will be fatal. As an example, may be given concealment of positive information of the day of sailing. (Bell's Com., 5th ed., 619 ; Bell's Prin. 474 ; Kiulloch v. Duguid, 22d Jan. 1813, F. C. 108 ; Hill v. Sibbald and Co., 16th June 1809, F. C. 303, reversed, 2 Dow's Rep. 263 ; Smith, March 9, 1810, F. C.)

1750. *Warranty* differs from representation in this, that whereas the effect of representation depends on whether or not the fact to which it refers is material to the risk, warranty, whether material to the risk or not, is an absolute condition, which, if not true or not complied with, defeats the insurance. (Bell's Com., 5th ed., i. 616 ; Bell's Prin. 475 ; M'Morran and Co. v. Newcastle Fire Insurance Co., 1815, 3 Dow 255.)

1751. *Express Warranties* are either mentioned in the body of the policy or in some instrument to which it refers. (Bell's Com. i. 617 ; Bell's Prin. 476 ; Bean v. Stupart, Doug. 11 ; Worsley v. Wood, 6 T. R. 710 ; Routledge v. Barrell, 1 H. Black. 254.)

1752. They have reference to the sailing or departure of the ship, to knowledge of her safety on the day of signing, and the like. (Ibid., ibid.)

1753. *Implied Warranties* are such as must of necessity be supposed to result from the very nature of the contract : for example, that the ship is sea-worthy ; that the navigation will

be conducted with ordinary care and skill; that the voyage is not forbidden by public law, etc. (Bell's Com. *ibid.*; Bell's Prin. 477; M'Kellar, Nov. 15, 1810, F. C.; Thomson, June 3, 1826, 4 S. 670; Cook, July 18, 1843, 5 D. 1379; Baker, Feb. 14, 1855, 17 D. 417; Feb. 28, 1856, 18 D. 691.)

1754. *Sea-worthiness* implies that the ship, rigging, and tackle are sufficient for the safe performance of the voyage. (Bell's Prin. *ibid.*; Bell's Com. *ibid.*)

1755. An old treenail hole imperfectly filled up, and thereby occasioning a leak, was held to free the underwriters. So the want of ground tackling sufficient for the ordinary perils of the sea, or of the rigging and sails necessary to enable the ship to escape from the enemy, or proceed with due expedition, are defects in sea-worthiness. (M'Kellar v. Henderson, 15th Nov. 1810, F. C.; Wedderburn v. Bell, 1807, 1 Camp. 1; Wilkie v. Geddes, 27th Feb. 1815, 3 Dow 57.)

1756. In this, as in other warranties, it signifies nothing whether the insured was himself aware of the ship's condition or not. No ignorance or innocence on his part will be an answer to the fact that the ship was unfit for the voyage. An inadequate force in the crew, or an incapable master, is deficiency in sea-worthiness. (Bell's Com. i. 617 and 618; Bell's Prin. 476 and 492.)

1757. *Non-alteration of the voyage* is an implied warranty; as is also *non-deviation*; for the risk being calculated on the regular course of a specified voyage, it is of the essence of the contract that that course shall be adhered to. (Bell's Com. i. 622; Bell's Prin. 492, *et seq.*)

1758. The mere intention to deviate, or an engagement to do so, or instructions to that effect to the master, will not discharge the underwriters if the ship is lost before the deviation. (Bell's Com. 622; Bell's Prin. 492.)

1759. If the deviation was necessary for the safety of the ship

or cargo, or of a part of the cargo, it will not discharge the underwriters, provided the shortest and most expeditious course has been adopted. (Dunlop v. Allan, 24th Nov. 1785, F. C.; Lavabre v. Wilson, Doug. 290; Smith, 2 Dow 538; Delaney, 1 T. R. 22; O'Reilly v. Gonne, 4 Camp. 249; Scott v. Thomson, 1 New Rep. C. P. 181; Foster v. Christie, 11 East. 205.)

1760. If a voyage to a given place be insured, but when the ship sails there is no intention of going to that place, she is held not to have sailed on the voyage though lost on the fair way of it. This is not a question of deviation, but of total abandonment of the insured voyage. But when the *termini* of the voyage contemplated are those described in the policy, the voyage is held to be the same up to the point of divergence. Total loss, therefore, before the diverging point, is covered; and in the case of partial loss, evidence will be led as to the proportion of it occurring before and after that point. (Bell's Prin. 492; Kewley, 2 Hy. Blackst. 343; Foster v. Wilmer, 2 Str. 1249; Marsden, 3 East. 572; Hare, 7 Barn. and Cress. 14.)

1761. *Total loss* does not necessarily imply the entire destruction of the subject insured. It may be only such damage as to render it comparatively valueless, or to reduce the value to less than the freight. (Bell's Com. i. 607; Bell's Prin. 480.)

1762. For purposes of insurance, a ship is totally lost where it cannot be repaired so as to proceed on the voyage at a reasonable expense, *i.e.*, at an expense not exceeding the value of the ship when repaired; and, in like manner, goods are totally lost where the object of the voyage is defeated. (Allan, 8 Barn. and Cress. 561; Thomson, 1823, 3 Muir 294; M'Iver, 4 Maule and Sel. 576; Fleming, 5th March 1846, *affd.* 18th April 1848.)

1763. *Abandonment*.—A claim for total loss must be accompanied by abandonment where there is anything remaining or in hope. The underwriter is thus left to make the most of what



may be saved. (Bell's Com. i. 607; Bell's Prin. 480, 484; Marshall, i. 593; Park, 228.)

1764. *Partial Loss or Injury*.—In cases of partial loss, the insurer recovers the estimated amount of the loss or damage, which is called *average*; but by the custom of trade no loss is paid unless it amounts to a certain per centage. In London this is regulated by a notandum on the policy, which sets out that corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5 per cent.; and all other goods, also the ship and freight, are warranted free from average under 3 per cent., unless general, or the ship be stranded. (Bell's Com. i. 611 and 614; Bell's Prin. 489 and 508; Park, 162; Stevens on Average, 158.)

1765. *Capture and Arrest by Princes* may be treated as total losses, and the ship abandoned just as in the case of shipwreck. (Bell's Prin. 472; Bell's Com. i. 608.)

1766. *Reinsurance*.—The interest which the underwriter has in the voyage is one which he is entitled to protect by insurance. This right, which, in most of the countries of Europe, is unlimited, has with us been restricted by statute (19 Geo. II., c. 37, sec. 4) to a remedy to the creditors or executors of the insurer. (Bell's Prin. 505; Marshall, 145.)

1767. *Double insurance* is where the insured effects insurance of the same risk with more than one set of underwriters. In this case he may sue for complete indemnity on both policies, though he cannot draw it under both, for that would amount to a wager policy. There is contribution and relief among the underwriters, all the policies to that intent being regarded as one. (Bell's Prin. 506; Davis v. Gildart, Marsh 148; Godin, 2 Burr 489; Irving, 2 Mood and Mal. 153, 2 Barn. and Ad. 193.)

*Fire Insurance.*

1768. Fire insurance is a contract by which the insurer undertakes for a limited period, in consideration of a premium, to indemnify the insured for such injuries to his house, or other premises, goods, or stock, as may occur from accidental fire. (Bell's Com. i. 625 ; Bell's Prin. 508.)

1769. The premium is commonly paid in advance ; and the transaction is managed, not by brokers, but by the insurer, commonly a joint-stock company, and the insured communicating directly.

1770. Policies without interest, which in marine insurance are orbidden (*ante*, p. 309) as a species of gambling, are in fire insurance most anxiously guarded against, as holding out temptations to wilful fire-raising. They might probably be challenged at common law, and they are prohibited by 14 Geo. III., c. 48. (Marshall, 790 ; Park, 654 ; Bell's Com. i. 625 ; Bell's Prin. 509.)

1771. But if the interest be real, it is a matter of indifference from what source it arises. A creditor who holds a security over the house or goods of his debtor, or a trustee or agent who has goods for sale on commission, have the same right to insure, up to the value of the property, as if it actually belonged to them. (*Ibid.*)

1772. Factors, warehousemen, printers, and the like, who have goods entrusted to them of which the value fluctuates from day to day, effect a general or floating insurance, applicable to all goods that may be in their warehouse, or to the goods that may be in all or any of their warehouses, cellars, granaries, or the like, at a certain port or in a certain city. (Bell's Prin. 517 ; see Donaldson, March 2, 1836, 14 S. 601 ; Dalgleish, Jan. 17, 1854, 16 D. 332.)

1773. The insured is allowed to sue on such a policy for the

loss of the property of his customers as well as his own, if he can show that by contract, or usage, or the course of dealing, he is liable for the goods. (Bell's Com., Shaw's ed., vol. i., p. 501.) He will be entitled, however, to apply the sum received to extinguish his own loss in the first instance. (Dalglish v. Buchanan, Jan. 17, 1854.)

1774. The policy must be written on stamped paper.<sup>1</sup> It stipulates that payments of premium shall be made within fifteen days from the day limited in the policy; and that no insurance shall take place till the premium is paid. An application presented and agreed to is thus no insurance until the stipulated deposit has been made. (Bell's Com., Shaw's ed., i. 502; Christie v. North British Insurance Co., 10th Feb. 1825.)

1775. The same general principles as to fairness in disclosing circumstances material to the risk, which we stated under marine, apply to fire insurance.

1776. Here also a warranty is part of the contract, and if not true, destroys the insurance, even though it should not be material to the risk.

1777. Mere increase of heat, though injurious to property, will not entitle the insured to recover,—there must be ignition. (Ibid.; Austin, 4 Camp. 360, 2 Marsh 130; Tarlton, 5 T. R. 695.)

1778. The policy covers all damage and injury incident to fire; such as that caused by water used in extinguishing the fire, and even reasonable charges for removing the articles which have escaped the fire altogether. (Johnston, 25th Nov. 1828, 7 S. 53.) Buildings separated by a stone or brick gable are usually insured separately, and not *in cumulo*. But in fire insurance, though a sum less than the value of the subject be insured, and a partial loss occur, the insured re-

<sup>1</sup> By 3 and 4 Will. IV., c. 23, the duty on each policy is 1s.; and 3s. per cent. per annum on every insurance made or renewed. Public hospitals, agricultural produce, farm stocking, and implements of husbandry, are exempted.

covers his whole loss, without contribution as for the value uninsured.

1779. Loss occasioned by want of occupancy of the premises destroyed, or loss of rent, is not covered by the policy, unless there be a special insurance to that effect. This point has been so decided both here (*Menzies v. North British Insur. Company*, Feb. 13, 1847; *Wright v. Pole*, 1 Adol. and El. 621) and in England, contrary to the opinion of Mr Bell. (Bell's Com., Shaw's ed., i. 503.) The English decision was held to be of equal authority with a Scotch one, in a department in which the laws of the two countries do not differ; but the Court held their view to be strengthened by the fact, that in the Scotch case the insurance company had reserved to itself the right of reinstating the buildings in place of paying the money. The loss was thus a loss which could be repaired by building.

1780. On the occurrence of a fire, the insured is bound to give the most satisfactory proofs he can be expected to possess of the amount of injury.

1781. He must also give notice of any other insurances effected, so as to afford an opportunity to the office claimed against to call for contribution. These and other conditions are generally inserted in the printed proposals. (Bell's Com., Shaw's ed., 504; Marshall, 788.)

1782. There is no abandonment as in a total loss in marine insurance, and the settlement is always on the principle of an average loss.

1783. The loss is generally settled by arbitration,—a clause of reference being very generally inserted in policies.

1784. By 19 Vict., c. 22, all insurances effected by foreign companies in Great Britain are subjected to the same duties as if made by British companies; and all persons who, as agents, receive proposals for insurance by companies out of the United Kingdom, are deemed to be persons keeping an

office for fire insurance, and are required to take out a license and give security for payment of duties under a penalty. (Secs. 1, 2, 3.)

*Life Insurance.*

1785. Life insurance is scarcely a contract of indemnity, like sea and fire insurance; but it may be viewed as a contract of mutual risk, as a means by which the insurer protects his family against the accidents which might occur to their fortune either from his death or his improvidence, or simply as an artificial mode of investing money. (Bell's Com. i. 629; Bell's Prin. 518; Marshall, 770; Park, 641; see Rose, 25th Nov. 1848, 11 D. 151.)

1786. The premium in consideration of which the insurer agrees to pay a certain sum on the death, or a certain annuity during the life of the insured, is proportioned to his age, health, and other circumstances.

1787. As in marine and fire, so, for still more obvious reasons, in life insurance, there can be no insurance where there is no interest. (14 Geo. III., c. 48.) The name of the party to be benefited must appear on the policy, and no more can be recovered by him than the amount or value of his interest.

1788. A creditor has an insurable interest in his debtor's life, but not if the debt be a gaming debt. (Bell's Com., Shaw's ed., 505; Lindsay, Feb. 19, 1851, 13 D. 718; Shand, May 31, 1859, 21 D. 878.)

1789. It is said (Bell's Com., Shaw's ed., i. 505) that a father has no insurable interest in the life of his son; but this is doubtful, and such insurances are quite common: a father has no other way of covering loss of outfit, purchase of a commission, or of a business. A wife or children have a sufficient interest to entitle them to open a policy on the life of the husband or father. (See Wight, 1849, 11 D. 459.) The same rules as to representation and warranty prevail as in the other insurances.

1790. The general declaration, that the person whose life is offered for insurance has "no disorder tending to shorten life," implies not that he is free from disease, which in every form has this tendency, but that he is in a reasonably good state of health, and has no known disease likely to lead directly to his death. (Ross *v.* Bradshaw, 1 Black 312; Willis *v.* Poole, Park 650, Marsh 771; Hutcheson, 21st Feb. 1845, 7 D. 467.)

1791. In most life policies, death abroad or at sea are excepted; but unless excepted expressly, they are covered by the policy. (Bell's Prin. 523.)

1792. Death by suicide, duelling, or by the hand of justice, are fatal to an insurance even when effected by creditors. (Bell's Com., i., Shaw's ed., 507.) In the case of the Amicable Society *v.* Bolland, it was held in the House of Lords, reversing the decision of the Court below, that the policy effected by Fauntleroy, who was executed for forgery, was forfeited, though there was no exception as to death by the hand of justice. (4 Bligh, N. S. 194.) It has been decided in England that a policy is not due where the insured killed himself while mad. The question is open in Scotland.

1793. The full sum in a life policy must always be paid as in a total loss.

1794. Life policies are constantly assigned in security for debt. A policy thus assigned reverts to the original holder when the debt is paid, and may be made the means of credit on another occasion. Assignment in sequestration, or under a commission of bankruptcy, carries a policy of life insurance.

1795. By 16 and 17 Vict., c. 34, sec. 54, it is provided, that persons who have made insurance, or contracted for a deferred annuity on the lives of themselves, or their wives or children, shall be entitled to deduct the amount of the annual premiums paid for such insurance, or the annual sum deducted from their salaries or stipends, from the Income Tax for which they are liable.

But no such abatement can be made beyond one-sixth part of the whole amount of profits and gains; nor does such abatement entitle any one to claim total exemption on the ground of his profits or gains being reduced below the assessable amount.

1796. This Act has been extended for a limited time by subsequent Acts.

## CHAPTER XII.

### COPYRIGHT.<sup>1</sup>

1797. The earliest statute by which an attempt was made to extend to published literary works that protection which, in some imperfect measure, they had enjoyed, by means of special licenses and patents, and the practice of printers and booksellers as far back as the time of Elizabeth, but which it has been found, both here and in England, that the common law does not afford them, was 8 Anne, c. 19 (1709).

1798. In Scotland "It was customary for the Lords of Privy Council to grant exclusive right to print and vend books for certain terms. . . . Most generally this right was given to booksellers and printers, and bore reference rather to the mercantile venture involved in the expense of producing the book, than to any idea of a reward for authorcraft." (Chambers's Domestic Annals of Scotland, vol iii.)

1799. In this statute, which extended to Scotland, it was enacted that the author should have the sole liberty of printing his works for fourteen years; and if he were living at the end of that term, that the right should return to him for another

<sup>1</sup> As to the legislation of different countries on the subject of copyright, see *Traité des droits d'Auteurs*, par M. Charles Renouard, Paris, 1838; and Curtis on the Law of Copyright. London and Boston, 1847.

period of the same duration. At the end of 28 years, at most, the copyright lapsed; and the work became public property. (Beckett and others *v.* Donaldson, Brown's Parliamentary Cases, vol. ii., p. 136.)

1800. This term was extended, and additional regulations introduced, by subsequent statutes (41 Geo. III., c. 107; 54 Geo. III., c. 156), which, along with that just referred to, were repealed by 5 and 6 Vict., c. 45 (1st July 1842). By this enactment the whole law relating to copyright in books was consolidated, and by it, as regards books published in Great Britain, it is still regulated.

1801. *What is a Book?*—The statute defines a book to mean “every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published.” (Sec. 2.) The term, as thus limited, does not include *designs* for ornamenting articles of manufacture, even although published in the *form* of a book; separate arrangements for the protection of which were made by the Designs Acts of 1842, 1843, and 1850, now consolidated and amended by the “Copyright of Designs Act, 1858. (21 and 22 Vict., c. 70; *infra*, sec. 1829.)

1802. By section 3 of 5 and 6 Vict., c. 45, it is provided, that the copyright of every book, as thus defined, (*ante*, sec. 1799) published in the lifetime of its author, shall endure for his natural life, and for the farther term of seven years, commencing at the time of his death, and shall be the property of the author or his assigns, provided that, if the term of seven years shall expire before the end of forty-two years from the first publication, the copyright shall, in that case, endure for such period of forty-two years; and that the copyright in every book published after the death of its author shall endure for the term of forty-two years from the first publication, and shall be the property of the proprietor of the



author's MS. from which such book shall be first published, and his assigns.

1803. There *must* thus, in every case, be a copyright for forty-two years, and there *may* be a copyright for a longer period, should the life of the author, and the seven years after his death, extend beyond the forty-two years.

1804. The extended period applies to copyrights under the old law, if held by the author or his representatives; but if belonging to "a publisher or other person who shall have acquired it for other consideration than that of natural love and affection," the extended term is to apply only in the case of the author, or his personal representative if he be dead, joining with the proprietor in a minute of consent, to be entered in the Stationers' Hall Register. The term "personal representative," when rendered into the legal phraseology of Scotland, means the person or persons who have succeeded to the moveable as opposed to the heritable estate, or the executor under a will as their representative. (Secs. 4 and 25.)

1805. To provide against the suppression of books of importance to the public, of which the authors are dead, it is enacted that the Judicial Committee of the Privy Council, on complaint that the proprietor of the copyright refuses to republish or allow republication, may license the complainant to publish the book.

1806. Copies of all books published after the passing of the Act, and copies of all subsequent editions with any additions or alterations, must be *delivered* at the British Museum within one calendar month if published in London, or within three calendar months if published elsewhere in Britain. In like manner, copies shall be given to the Bodleian Library at Oxford, to the Public Library at Cambridge, to the Library of the Faculty of Advocates, Edinburgh, and to the Library of Trinity College, Dublin (sec. 8), *on demand in writing* being left at the abode of

the publisher at any time within twelve months, under the hand of the officer of the Company of Stationers appointed for the purposes of the Act, or under the hand of any other person authorized by these bodies. This arrangement was a modification, and a very important one for the public interest, of the obligation which was imposed on publishers, by the former statutes, to *deliver* eleven copies of each new work to certain universities and other public institutions.

1807. By sec. 9, publishers are permitted to deliver their books at the libraries themselves, in place of at Stationers' Hall; and by sec. 10, a penalty not exceeding five pounds, in addition to the value of the book, is imposed in case of failure to comply with these requirements.

1808. *Register at Stationers' Hall.*—A book of registry is to be kept at Stationers' Hall, open to inspection for a fee of one shilling (sec. 11), wherein it shall be lawful for, but not, as formerly, obligatory on, the proprietor of copyright in any book to make entry of the title of such book, the time of the first publication thereof, and the name and place of abode of the proprietor of the copyright, or of any portion of the copyright, upon payment of the sum of five shillings to the officer of the Company; and every such registered proprietor may assign his interest, or any portion of his interest therein, by making entry in the said register of such assignment, and of the name and place of abode of the assignee, on payment of the like sum, and such assignment shall be effectual without being subject to any stamp or duty, and shall be of the same force as if made by deed. (Sec. 13.) No proprietor of copyright shall sue or proceed for any infringement of the Act before making entry in the book of registry. (Sec. 24.)

1809. Persons aggrieved by any entry in the book of registry may apply to a court of law in term, or to a judge in vacation, who may order such entry to be varied or expunged. (Sec. 14.)

1810. Any person who shall print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent, in writing, of the proprietor, or shall import for sale or hire any such book unlawfully printed from parts beyond the sea, or knowing such book to have been so printed or imported, shall trade with it, or have it in his possession for purposes of trade, shall be liable to an action of damages. (Sec. 15.)

1811. A subsequent clause provides a summary mode of punishment by conviction before two justices of the peace—and the infliction of the penalty of forfeiture of the books, of L.10, and double the value on any person except the proprietor, or a person authorized by him, who shall import into the British dominions, for sale or hire, books first composed, written, or printed and published in any part of the said kingdom, and reprinted elsewhere.

1812. The books seized by the officers of customs or excise, in obedience to this section, are to be destroyed. (Sec. 17.)

1813. An alien may own the copyright of a work published first in Great Britain; but he cannot claim an English copyright in a work which has been published first in a foreign country with which there is no international law of copyright. Attempts are often made to obtain both a British and an American copyright, by issuing the work in both countries on the same day.

1814. *Reviews, Encyclopædias, etc.*—A new and important arrangement is introduced as to the copyright of works produced by the joint efforts of several individuals. By sec. 18 it is enacted, that when the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or of any book whatsoever, shall have employed several persons to compose the same, the copyright in every such work shall belong to the proprietor as if he were the actual author thereof; and as against third parties he shall be pro-

tected for the full period of forty-two years ; but after the term of twenty-eight years, the right of republishing the articles of which such works are composed shall revert to their authors for the remainder of the term given by the Act. It is further provided, that, during the twenty-eight years, the proprietor shall not publish the articles singly or separately without the consent of their authors ; nor shall those authors be affected who have reserved, or may in future reserve, the right of publishing their articles in a separate form. (Sec. 18.)

1815. *Musical and Dramatic Works*.—The provisions of the Act are extended to musical compositions, and the term of copyright, as provided by the Act, is applied to the liberty of representing dramatic pieces and performing musical compositions. Songs are thus protected from being sung, and pieces from being set to music for sale, without permission. (Sec. 20.)

1816. *Engravings, Maps, etc.*—The copyright of engravings, works of art, maps, plans, etc., on plates, is twenty-eight years from the day of publication. It is still regulated by the statutes 8 Geo. II., c. 13 ; 7 Geo. III., c. 38 ; 17 Geo. III., c. 57 ; 7 Will. IV., c. 59, the provisions of which are extended by 15 Viet., c. 12, to prints taken “by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely.” (Sec. 14.)

1817. *Sculpture*.—By 54 Geo. III., c. 56, the sole right and property of all new and original sculpture, models, copies, and casts, is vested in the proprietors for fourteen years (sec. 1), and for an additional term of fourteen years to the original sculptor, should he be living (sec. 6).

1818. *Universities*.—The privileges of perpetual copyright held by the universities in any works deposited with them, in order that the profits of the publication may be applied to the advancement of learning, under 15 Geo. III., c. 53, are reserved. (Sec. 27.)

1819. *Lectures* delivered in public are protected by a special statute (5 and 6 Will. IV., c. 65) from publication by those who, by the payment of fees or otherwise, have obtained permission to hear them; and when published by their authors they enjoy the same copyright as other works. There is an exception power (sec. 5) in the case of lectures delivered in any university, public school, or college, "in virtue of or according to any gift endowment or foundation."

1820. *Letters*.—The Court of Session has always held itself competent to protect epistolary correspondence, not on the ground of copyright, but of right on the part of the writer to protect his reputation and his privacy; and a like power has been exercised by the Court of Justiciary. (Proceedings in the case of the "Scotch Thistle" newspaper; Irvine's Report of the Trial of Madeleine Smith, 98 and 305.) In England, epistolary correspondence is held to be the property, not of the receiver but of the writer. The receiver may retain the letter for his own use, but he cannot publish it without the permission of the writer or his heirs; neither can he sell it as a curiosity. (Curtis on the Law of Copyright, pp. 87, 89, *et. seq.*)

1821. *Newspapers*.—Newspaper matter is subject to the law of copyright, but, for mutual convenience, the practice of copying intelligence without acknowledgment, and even leading articles when acknowledged, is generally tolerated by the members of the press.

1822. *International Copyright*.—The leading enactment on this subject is 7 Vict., c. 12, as extended and explained by 15 Vict., c. 12. By the first of these statutes the Crown is empowered, by Order in Council, to extend the privileges of British copyright to works first published in foreign countries, but provided that no such Order shall have effect unless it shall be therein stated as the ground for issuing it, that reciprocal protection to the works of British authors has been secured. (Secs. 2 and 14.)

1823. The provisions of the British Copyright Acts as to the entries in the register book at Stationers' Hall are incorporated in the International Copyright Act.

1824. By the subsequent statute (15 Vict., c. 12), an Order in Council may be issued to the effect that the authors of books published in foreign countries may, for a limited time, prevent unauthorized translations of their work from appearing in Britain. The time is not more than *five* years from the publication of an authorized translation. (Sec. 3.)

1825. The same privilege may be extended to the authors of dramatic works expressed in foreign countries; but adaptations of dramatic pieces to the English stage are not prevented. (Sec. 6.)

1826. All articles in newspapers or periodicals relating to politics may be republished or translated, and also all similar articles on any subject, unless the author has notified his intention to reserve the right. (15 Vict., c. 12, sec. 9.)

1827. The prohibition against the importation of works illegally printed abroad, which the former copyright Acts had confined to those originally printed in Britain, is extended to all works wherein there is any subsisting copyright under the International Copyright Acts, except as regards the country in which such works are first published, and to all unauthorized translations. The provisions of 5 and 6 Vict., c. 45, as to forfeiture of pirated works, are extended to works prohibited to be imported under this Act. (Sec. 9.)

1828. In accordance with the convention entered into with France, it is enacted, that French translations shall be prohibited, and this without any further Order in Council. (Sec. 11.) Further, in fulfilment of the said convention, the duties on books and engravings published in France are reduced; and it is enacted that these duties shall not be raised during the continuance of the treaty; and if a further reduc-

tion be made for other countries, it shall be extended to France.

1829. *Copyright in Designs*.—By the “Copyright of Designs Act, 1858,” the protection which was granted to the proprietor of any new and original design for ornamenting articles of manufacture by the Act of 1842, of nine months, is extended to three years, to be computed from the time of such design being registered; provided that the term of such copyright shall expire on the 31st December, in the second year after that in which the design was registered, whatever be the day of such registration. By 24 and 25 Vict., c. 73, the provisions of the Copyright of Designs Act are extended to persons not British subjects.

## CHAPTER XIII.

### OF PATENTS.

1830. Closely analogous to the law of copyright is the law of patents, by which the inventor of any vendible commodity or substance is guaranteed a monopoly in the invention, for a limited time.

1831. The power of granting patents of invention, like patents of corporation, forms a part of the royal prerogative.

1832. When the power of the Crown, to grant monopolies in other cases, was abolished in England by 21 Jac. I., c. 3, in consequence of the unwarrantable use which had been made of it at the instigation of the Duke of Buckingham, this privilege was retained as regarded “letters patent to use new manufactures” (sec. 5); and this rule seems by tacit consent to have been followed in Scotland (Bell’s Com. 138; Burton’s Private Law, 79), notwithstanding the apparently general import of a subsequent Scottish statute. (1641, c. 76.)

1833. The English Act limited the period, which formerly had extended to twenty-one years, to fourteen in the case of all future grants. (Sec. 6.)

1834. But a prolongation for another seven years may now be granted on special application (5 and 6 Will. IV., c. 83); and it is further competent for the holder of a patent or his assignee to present a petition to the Queen in Council, setting forth that he has been unable to obtain a due remuneration for his expense and labour, that the extended period of seven years will not suffice for this purpose, and praying for a further extension. The application having been reported on by the Judicial Committee of the Privy Council, Her Majesty may, if she think fit, extend the term to any period not exceeding fourteen years. (7 and 8 Vict., c. 69, sec. 2.)

1835. The leading enactment on the subject of patents is now (15 and 16 Vict., c. 83) "the Patent Law Amendment Act, 1852."

1836. By section 1, the law officers of the Crown (in Scotland, the Lord Advocate and Solicitor-General), and such other persons as Her Majesty may think fit, are constituted commissioners of patents for inventions; three of them being empowered to act, the Chancellor or Master of the Rolls being one. To these commissioners, who are to report annually to Parliament, is in future entrusted the whole duties of government in relation to patents; Her Majesty's power of granting patents, or reversing the proceedings of the commissioners, being specially reserved. (Sec. 16.)

1837. *Petitions for Grants of Letters Patent*, accompanied by the requisite declaration of their truth (5 and 6 Will. IV., c. 62, sec. 11), must be left at the office of the commissioners. And there must further be left a statement in writing, called the "Provisional Specification," signed by or on behalf of the applicant, and describing the nature of the invention. (Sec. 6.)

1838. Every application is to be referred by the commissioner to one of the law officers; who, in judging of the provisional



specification, shall be at liberty to call to his aid such scientific or other person as he may think fit.

1839. If the law officer, after this investigation, is satisfied that the provisional specification describes the nature of the invention, he shall grant a certificate of allowance, which shall act as a provisional protection for six months, from the consequences of use and publication. (Sec. 8.)

1840. Should the applicant prefer it, he may file, with his petition and declaration, a complete specification, in which case the invention shall be protected for six months, and the applicant shall have the like powers, rights, and privileges during that term, as are conferred by letters patent. (Sec. 10.)

1841. The commissioners are to cause these protections to be advertised, and also the subsequent application for the letters patent, should the applicant persevere, along with such opposition as may be offered to his application. (Sec. 12.)

1842. After hearing the objectors, and determining the question of costs, the law-officer is empowered to cause a warrant to be made for sealing the letters patent with the seal of the commissioners.

1843. The letters patent, when finally issued under the great seal, are valid for the whole of the United Kingdom. (Sec. 18.)

1844. Such letters may be granted to the personal representatives of the applicant during the term of protection, or within three months after the applicant's decease; and the letters so granted shall be of the same effect as if they had been granted to the applicant himself. (Sec. 21.)

1845. *Foreign Inventions.*—Letters patent obtained in the United Kingdom for patented foreign inventions are not to continue in force after the expiration of the foreign patent. (Sec. 25.)

1846. English letters patent are not to prevent the use of inventions in foreign ships, or for the purpose of navigating them in British waters, except ships of foreign states in whose ports

British ships are prevented from using foreign inventions. (Sec. 26.)

1847. Copies of all specifications (other than provisional specifications) shall be open to inspection, and the commissioners shall cause them to be printed, published, and sold.

1848. A register of patents shall be kept at the office of the commissioners, wherein shall be entered and recorded in chronological order, all letters patent granted under the Act, and all other documents connected with the granting or cancelling of such letters. (Sec. 34.)

1849. Any number of persons may now have a legal interest in letters patent. (Sec. 36.)

1850. *Actions for Infringement of Letters Patent.*—When proceedings shall require to be taken in Scotland to repeal any letters patent, they shall be in the form of an action of reduction at the instance of Her Majesty's Advocate, or at the instance of any other party having interest, with the Lord Advocate's concurrence.

1851. Two subsequent statutes have been passed on the subject of patents: the first to substitute stamp duties for fees on passing letters patent for inventions, and to provide for the purchase for the public use of indexes to the existing specifications, to the number of fifteen thousand and upwards, which had been constructed by a private person;<sup>1</sup> the second is to amend the

<sup>1</sup> 16 Vict., c. 5. 1853:—

The following is the schedule of stamp duties appended to the Act:—

On Petition for Grant of Letters Patent, . . .	L.5	0	0
On Certificate of Record of Notice to Proceed, . . .	5	0	0
On Warrant of Law Officer for Letters Patent, . . .	5	0	0
On Sealing of Letters Patent, . . . . .	5	0	0
On Specification, . . . . .	5	0	0
On Letters Patent, or Duplicate thereof, before the expiration of the third year, . . . . .	50	0	0
On Letters Patent, or a Duplicate thereof, before the expiration of the seventh year, . . . . .	100	0	0

Act of 1852, by providing that certified copies of all specifications, and complete specifications, fac-similes of drawings, disclaimers, and memoranda of alterations filed under the Patent Act, shall be transmitted to the office of the Director of Chancery in Scotland, and to the Enrolment Office of the Court of Chancery in Ireland, and certified copies furnished to applicants. (16 and 17 Vict., c. 115. 1853.)

1852. *Principle*.—It is a fixed point in patent law, that the patent must be for a vendible matter, and *not for a principle*. “The very statement of what a principle is,” said Mr Justice Buller (in *Boulton v. Bull, v. Croyton*, p. 69, *et seq.*), “proves it not to be a ground for a patent; it is the first ground and rule for arts and sciences, or, in other words, the elements and rudiments of them. A patent must be for some new production from those elements, and not for those elements themselves.” And, in another case (*Neilson v. Harford* (1841), Web. P. R. 343), it was held that “the patent is not for a principle, but for the mode of carrying that principle into practice.”

1853. But infinite difficulty has arisen in fixing, in individual cases, the point at which the principle becomes a vendible commodity. Mr Croyton, in his “Treatise on Patent Law,” thus states the results of the various discussions to which the subject has given rise:—“As a general rule, wherever a discovery is made of a principle or property of matter applicable to the improvement of manufactures, there is good ground for a patent, provided the subject matter of it be expressed in the proper form.” The original discoverer cannot, however, take out a patent for its general application. Thus, Mr Justice Heath says,

On Certificate of Record of Notice of Objections,	.	2	0	0
On Certificate of Search and Inspection,	.	0	1	0
On Certificate of Entry of Assignment or Licence,	.	0	5	0
On Application for Disclaimer,	.	5	0	0
On Caveat against Disclaimer,	.	2	0	0
On office copy of Documents, for every Ninety words,	.	0	0	2

“that a patent could not be claimed for the use of the power of steam. It must be for the vendible matter, and not for the principle.” (Croyton, 177.) The reason of this rule seems to be better given by Mr Bell than by any of the English authorities, where he says, that, if the discovery of the expansive force of steam had been made the subject of patent, “it would have comprehended and restrained any future invention proceeding on that principle.” (Com. 541.)

1854. Letters patent are moveable, being granted in favour of the patentee, “his executors, administrators, and assigns.” (See form in schedule to Patent Law Amendment Act, 1853.)

1855. *Simultaneous Invention*.—Where there are simultaneous applications, the decision of the claim is left to the law officer of the Crown. The rule which has been followed seems to be, that, if several persons have possessed a knowledge of the invention in common, no one of them can obtain a patent. But the case is different when several persons have made the discovery at the same time, but without communicating it to each other or using it. In these circumstances, the patent will be given to the first applicant.

1856. *Aid in Invention*.—The claimant must be really the inventor, and must not have availed himself of the suggestions of another person. The rule as to the employment of servants is this:—“If the servant make a new discovery by himself, such invention becomes his property; but if the master plans, and the servant only executes, *with alterations of his own*, then the master is the true inventor.” (Godson, 28.) It is not unusual for letters patent to be taken in the names of two or three persons; but, if it should be discovered that any one or more of these persons had no share in the discovery, the patent would be void. (Ibid.)

1857. It was formerly decided that a patent cannot be taken for Scotland if the invention has been in use in England; and

international questions between the two countries are now precluded,—15 and 16 Vict., c. 83, being applied to the whole kingdom.

## CHAPTER XIV.

### SECURITIES FOR DEBT.

1858. *Personal Bond*.—We have already mentioned (*ante*, p. 310) that bills and promissory notes are very frequently used as simple and economical methods of constituting personal obligations. But, where special conditions are attached to the loan, or where the money is likely to remain unpaid for a lengthened period, the personal bond which carries the long prescription of forty years must be resorted to.

1859. The bond is a simple acknowledgment of the receipt of, and obligation to repay money lent or otherwise owing, executed with the formalities requisite in all probative writings. (*Ante*, pp. 192, 193.)

1860. Bonds, with a clause obliging the debtor to pay interest, unless made heritable by express destination, are moveable in questions of succession by statute 1661, c. 32; but, as rights bearing a tract of future time, they are heritable in questions between husband and wife, and with the “fisk” or exchequer (*quoad fiscum*).

1861. Bonds usually contain a clause imposing a penalty in case of failure to pay, of “a fifth more,” that is to say, over and above performance of the primary obligation. But whatever may be the extent of the penalty, it is liable to an equitable reduction by the Court, so as to meet the damage actually incurred. (*Menzies*, 196; *Gordon v. Maitland*, 27th Nov. 1761, M. 10050; *Young v. Sinclair*, 21st May 1796, M. 10053;

*Cowper v. Stuart*, 4th Jan. 1740, M. 10044 ; *Ramsay v. Goldie*, 22d June 1826, 4 S. 737.)

1862. A bond generally contains a clause of "registration for execution." If registered, in terms of this clause, in the books of a court having jurisdiction to enforce it, execution will proceed against the person and property of the debtor, a simple extract from the record being held equivalent to a decree of consent. (Menzies, 200.)

1863. In addition to being used as securities for the payment of money, such bonds are commonly employed to constitute cautionary obligations, or to grant security for a cash credit at a bank. (*ante*, 351, 356.)

1864. The rate of interest payable on a personal bond, though usually five per cent., depends, since the repeal of the usury laws, by 17 and 18 Vict., c. 90 (10th August 1854), wholly on the stipulation of the parties.

1865. With reference to obligations entered into before the passing of the Act, it is provided (sec. 3), that "where interest is now payable upon any contract, express or implied, for payment of the legal or current rate of interest, or where, upon any debt or sum of money, interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this Act had not passed."

1866. The Court of Session found, in a recent case (*Smith v. Barlas*, Jan. 15, 1857), that the term "legal interest," where the contrary is not specified, still means five per cent.

1867. *Heritable Bond*.—This is a form of security on land which, in practice, has almost entirely superseded the ancient obligations of wadset, and infestment of annual rent. (Menzies, 797; Bell's Prin., 909 ; 1 Bell's Com., 671.)

1868. By this deed the borrower obliges himself to repay the sum lent, with interest and penalty ; and in further security, and over and above his personal obligations, he grants to the creditor

a real but redeemable right in the lands themselves, as well as in an annual rent corresponding to the interest of the debt.

1869. There is generally a clause of registration for execution, as in the personal bond.

1870. *Bond and Disposition in Security*.—This form of security affords a more expeditious method of making good the debt, by giving the creditor a power or commission to sell the lands in certain circumstances. It is, in short, a complete conveyance of the lands to the debtor, redeemable on payment, the debtor being protected from advantage being taken of the power of sale thus conferred, by a clause in which the creditor is precluded from selling without warning of his intention, communicated in accordance with certain prescribed forms. This clause is strictly interpreted; and even where it is omitted, the Court will interpose to prevent the property from being surreptitiously disposed of. Neither is the creditor, even after notice, entitled to possess himself of the whole proceeds of the sale. He is merely entitled to pay himself, and must account to the debtor or his creditors for every farthing he receives beyond the sum requisite for that purpose. (Menzies, 801 and 810; Bell's Prin., 910; 1 Bell's Com., 672; see *Kerr v. Macarthur*, 23d Dec. 1848, 11 D. 301; Jeffrey, 16th June 1826, 4 S. 728; Dickson, 15th Jan. 1831, 9 S. 282.)

1871. *Absolute Disposition with Back Bond* is a form of landed security for future advances, sometimes given to bankers in security for a cash credit. (Principles, sec. 912.) It is in form an absolute conveyance of heritage; the creditor (disponee) granting the debtor (disponer) a back bond, disclosing the true character of the transaction. (Menzies, 811; 1 Bell's Com., 672.)

1872. For an account of the modes of transference and extinction of heritable securities, see 8 and 9 Vict., c. 31.

1873. "The chain of feudal titles to land," says Mr Bell (Bell's Com., Shaw's Ed., p. 905), "continues unbroken and unaffected by these rights in security, which are held as excrescences on the

property, and may be created or dissolved without affecting the radical right to the estate, or touching the progress of titles."

1874. Though constituted feudally, they are mere accessories of the debt, and are discharged by its extinction, or annihilated by renunciation, without any feudal form of re-conveyance.

1875. *Inhibition* is a mode of protecting an heritable security from alienation or depreciation. By this diligence the debtor inhibited is prevented from contracting any new debt which may be or become a burden on his heritage, or whereby it may be attached or alienated to the prejudice of the creditor inhibiting. Inhibition may be used on a depending action. Letters of inhibition are issued from the signet on a warrant from the Lord Ordinary on the Bills. (Stair, iv. 50; Ersk. ii. 11; Bell's Com. ii. 141; Bell's Prin. 2386; Menzies, 820.)

1876. In addition to the prohibition against the debtor, these letters prohibit the lieges from accepting a conveyance of his property, or taking vouchers of debt from him. With a view to this double prohibition, it is necessary that the letters of inhibition be not only executed against the debtor, but that they be published at the head burgh of the shire where he resides, or edictally, if he be abroad. It is also necessary that letters of inhibition be registered either in the local register of the county; or, if they be intended to apply to the whole of Scotland (1518, c. 119), in the general register at Edinburgh (1600, c. 13).

1877. Inhibition is strictly personal, and, consequently, on the death of the person inhibited, his heir will not be affected by the prohibition, unless it be renewed against him. It is provided by the Bankrupt Act (19 and 20 Vict., c. 79), that the truster's right in a sequestration "shall not be challengeable on the ground of any prior inhibition, saving the effect which such exhibition may be entitled to in the ranking of creditors." (Sec. 102.)

1878. *Modes of rendering Securities Effectual*.—Poinding of the ground and actions of mails and duties are legal modes of ren-



dering heritable securities effectual, the nature of which it scarcely belongs to the province of a popular work to explain. It is proper, however, to call attention to the following provision of the Bankrupt Act on the subject of these diligences:—

1879. “No poinding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of mails and duties on which the charge has not been given sixty days before the said date, shall (except to the extent hereinafter provided) be available in any question with the trustee. Provided that no creditor who holds a security over the heritable estate preferable to the right of the trustee, shall be prevented from executing a poinding of the ground or obtaining a decree of mails and duties after the sequestration, but such poinding or decree shall, in competition with the trustee, be available only for the interest on the debt for the current *half-yearly* term, and for the arrears of interest for one year immediately before the commencement of such term.” (19 and 20 Vict., c. 79, sec. 118 (1856).)

## CHAPTER XV.

### OF THE POOR.

1880. Mr Dunlop, in his valuable Treatise on the Poor Law, has quoted from Fletcher of Saltoun's Second Discourse Concerning the Affairs of Scotland, a passage which is so well calculated at once to reconcile us to the present condition of the lower orders in this country, and to strengthen our hopes of its farther amelioration, that we consider it a duty to reproduce it in the present work.

1881. “There are at this day (1698) in Scotland (besides a great number of families very meanly provided for by the church

boxes, with others who, with living upon bad food, fall into various diseases), 200,000<sup>1</sup> people begging from door to door. These are not only no ways advantageous, but a very grievous burden to so poor a country ; and, though the number of them be perhaps double to what it was formerly,<sup>2</sup> by reason of the great distress, yet in all times there have been about 100,000 of these vagabonds, who have lived without any regard or submission either to the laws of the land, or even of those of God and nature,—fathers incestuously accompanying their own daughters, the son with the mother, and the brother with the sister. No magistrate could ever discover or be informed which way any of these wretches died, or that they ever were baptized. Many murders have been discovered among them ; and they are not only a most unspeakable oppression to poor tenants (who, if they give not bread, or some sort of provision, to perhaps forty such villains in one day, are sure to be insulted by them), but they rob many poor people who live in houses distant from any neighbourhood. In years of plenty, many thousands of them meet together in the mountains, where they feast and riot for many days ; and at the country weddings, markets, burials, and other the like public occasions, they may be seen, both men and women, perpetually drunk, cursing, blaspheming, and fighting together.”<sup>3</sup>

1882. The object of the earlier statute law of Scotland, beginning with the reign of James I. (1424, c. 7), is not so much to provide for the necessitous poor, as to suppress the disorderly gangs of whom Saltoun speaks, who are described as “maisterful beggars and sornares, that dailie oppressis and herryis the

<sup>1</sup> The number of registered poor on 14th May 1860 was 77,306 ; and the whole number of registered and casual poor relieved during the previous year was 135,063. The population since 1698 must have more than quadrupled.

<sup>2</sup> As an opponent to the Union, Fletcher was bound to make the best of former times.

<sup>3</sup> The condition of England, a century earlier, is described as having been extremely similar.—*Strype's Annals*, vol. iv., No. ccxiii. ; *Dunlop*, p. 6.

kingis lieges" (1477, c. 77); and of whom we are told that they were in the habit of going about with "horse, houndes, and uther gudes." The permission to beg, it is true, was given to the poor by the first enactment, and it was continued, under various regulations, "to cruiked folk, seik folk, impotent folk, and weak folk." (1503, c. 70.) It was for their benefit, too, that in the time of James V. (1535, c. 22) the system of tokens was introduced, and each beggar was confined, in the exercise of his vocation, to the parish of his birth.

1883. But the most important of the earlier statutes, and that which forms the basis of our present poor law, was passed shortly after the accession of James VI. (1579, c. 74.) After repeating the penalties of former Acts against the classes of persons above described—amongst whom are included "vagabond schollers of the Universities of St Andrews, Glasgow, and Abirdene, not licensed by the Rector and Deane of Facultie of the Universities to aske almes"—the Act goes on to impose an assessment for the support of "pure, aged, and impotent persons." "Provosts, baillies, and judges in the parochinis to landwart, and sic as they sall call to them to that effect," are instructed "to tax and stent the hail inhabitants within the parochin, according to the estimation of their substance, without exception of persons, to sic oukly (weekly) charge and contribution, as sall be thought expedient and sufficient to susteine the saidis pure peopil." This taxation is directed to be renewed from year to year; but it is said that no assessment was actually imposed for upwards of a century afterwards. (Smith's Digest of the Poor Law, 87; but see Chambers's Domestic Annals, i. 345-6.)

1884. The management of the poor was transferred to the kirk-sessions and heritors of parishes by subsequent statutes (1592, c. 149; 1597, c. 272; and 1672, c. 18); and in Charles the Second's time the residential settlement of three years, which continued till 1845, was introduced.

1885. In addition to our statute law, there are various proclamations of the Privy Council of Scotland, which had been entrusted with something approaching to legislative powers in the matter, and whose directions were subsequently ratified by statute. (1698, c. 21.)

1886. The provisions contained in the whole of these statutes and proclamations divide themselves into two classes—the one relating to the punishment and latterly to the employment of vagabonds, and possessing throughout a penal character; the other having reference to the support of the aged and impotent poor. The former class, which probably never were very systematically enforced, “may now be considered as in total desuetude” (Dunlop, p. 25); the latter contained the provisions for the relief of the poor, which remained unchanged till the passing of the recent Act “for the amendment and better administration of the laws relating to the relief of the poor in Scotland” (8 and 9 Vict., c. 83, 4th Aug. 1845), and which, where unaffected by that statute, are still in force.

1887. The main provisions of this important statute are—

1888. (1.) The establishment of a central Board of Supervision, with one paid member and a secretary, with full powers to inquire into the condition of the poor, and to make annual reports to the Secretary of State. The Board is further entrusted with certain limited powers of control over the parochial boards and their inspectors, such as the suspension and dismissal of these officers.

1889. (2.) The institution of a new parochial board in place of the heritors and kirk-session in all parishes in which an assessment has been levied. This board is to consist of the proprietors of heritage in the parish of above L.20 of yearly value, together with members elected by the other ratepayers, and delegates from the kirk-session.

1890. (3.) The provision that no court of law shall entertain

or decide any action relative to the amount of relief granted by parochial boards, unless the Board of Supervision shall previously have declared that there is a just cause of action, in which case the pauper shall be entitled to the benefit of the Poor's Roll in the Court of Session. The jurisdiction of the parochial board in reference to administering the funds, ordering and disposing of the poor, and determining the amount and nature of the relief to be given in each particular instance, is thus exclusive of every other in the first instance.

1891. (4.) The most important variation on the previous law, is the extension of the period necessary to acquire a settlement by residence to five years, and the introduction of the principle that residential settlements may be lost by non-residence alone for more than four years, or, in the words of the statute (sec. 74), if during any subsequent period of five years, the party "shall not have resided in such parish or combination continuously for at least one year."

1892. (5.) The provision for the removal of English and Irish paupers, and for their criminal prosecution on their return, under the statute 1579, c. 74.

1893. (6.) The provision for prosecution, under the same Act, of husbands deserting their wives, and of mothers and putative fathers refusing to maintain their illegitimate children.

1894. (7.) The right given to all destitute persons to claim interim maintenance from the parishes in which they become destitute, until the parish or combination to which they belong has been ascertained.

1895. (8.) The provision for the union of parishes under the authority of the Board of Supervision.

1896. (9.) Each parish or combination must appoint an inspector, in whose name all law proceedings connected with the poor proceed.

1897. A subsequent statute (24 and 25 Vict., c. 18) makes

provision for the dissolution of combinations of parishes by the Board of Supervision, on application being made to it for that purpose by the Parochial Board.

1898. The existence of several excellent manuals on the subject of the Poor Law, intended and suited for popular as well as professional use,<sup>1</sup> render it unnecessary that we should do more than add to the above sketch such information as may serve for the practical guidance of such non-official persons as may interest themselves in the condition of the poor.

1899. *Application for Relief*.—The inspector of the poor in the parish or union in which the pauper happens to be resident for the time being, or the inspector of the district, if the parish has been so divided, are the persons to whom respectively application is to be made when a case of destitution occurs. It is not necessary that such application be in writing. (Sec. 70.)

1900. The inspector is bound to give interim relief, or to state his reasons for refusal, within twenty-four hours. If he provide the necessary support in the meantime, he may delay his decision for such time as may be required for investigation. (Sec. 73.)

1901. If a pauper be refused relief altogether, he is entitled to apply to the Sheriff; but if his complaint be, not that he has been refused relief, but that the relief granted to him is inadequate, the Sheriff has no power, and he must go to the Board of Supervision. (Sec. 74.)

1902. *Medical Attendance and Education*.—By sec. 69, parishes are required to provide medical relief to the poor, and education for poor children.

1903. *Persons Entitled to Relief*.—(1.) Poor persons of seventy

<sup>1</sup> 1. The Law of Scotland regarding the Poor, by A. M. Dunlop, advocate. Edition 1854.

2. Poor Law Manual for Scotland, by A. M'Neil Caird, Esq. 1851.

3. Digest of the Law of Scotland relating to the Poor, by J. Guthrie Smith, advocate. 1859.

years or upwards, or under that age, if so infirm as to be unable to gain a livelihood by their work.

1904. (2.) Orphans and destitute children under fourteen years of age, whether legitimate or illegitimate.

1905. (3.) All who, from permanent bodily disease and debility, are unable to work. "It is not necessary, to entitle such persons to relief, that they should be totally incapable of performing any work whatever ;" it is sufficient that they be unable to work so as to gain a livelihood, and that they "must of necessity be sustained by almes." (Dunlop, p. 29.)

1906. Destitute widows and deserted wives with children are entitled to claim ; and, in case of refusal, the *onus* of establishing that they are able to support themselves and their children, and consequently are not proper objects of relief, lies on the parish.

1907. Idiots and insane persons are entitled to support.

1908. The Act to amend the Lunacy Act of 1857 (21 and 22 Vict., c. 89 (2d Aug. 1858), contains a provision to the effect that it shall be lawful for the Commissioners in Lunacy for Scotland to grant to the governors or keepers of poor-houses licenses for the reception of pauper lunatics in wards set apart for that purpose, or in detached or separate portions of such poor-houses so set apart and licensed, subject to such rules, regulations, and restrictions as may be framed by the General Board of Commissioners in Lunacy for the reception and treatment of patients in such wards or portions of poor-houses, consistently with the provisions of the former Act. This Act to continue in force for five years from 1st January 1858 ; a provision which may give rise to some difficulty, seeing that when the Act came into operation a portion of the time was already past.

1909. Foreigners who have acquired a settlement in this country are, equally with natives, entitled to demand permanent

relief from the parish of their settlement, or interim relief till that parish is ascertained, or they have been enabled to leave the country. None but English and Irish paupers can be compulsorily removed (8 and 9 Vict., c. 83, secs. 77–8–9); and a foreigner returning, whose passage had been paid by the inspector, would be entitled again to claim relief, and would not be liable to the penalties imposed upon English or Irish paupers returning.

1910. *Occasional Relief*.—The general, if not the exclusive object contemplated in the Scottish statutes, was the relief of those permanently disabled. But, though not imperative, the necessity of the case had introduced into almost every parish the practice of affording relief to persons labouring under temporary sickness.

1911. The right of such persons to relief is now established by the section of the recent statute which provides, that “all assessments imposed and levied for the relief of the poor shall extend and be applicable to the relief of occasional as well as permanent poor.” (Sec. 68.)

1912. The same section provides, that “nothing herein contained shall be held to confer a right to demand relief on able-bodied persons out of employment;” leaving it, of course, an open question whether such right existed prior to that statute. The question as to whether this right existed under the former statutes, or at common law, which had given rise to much difference of opinion, was deliberately decided in the negative by the Court in the case of two able-bodied men, one claiming for himself, the other for behoof of his children; and as this judgment of the Court was affirmed by the House of Lords on appeal, the point is placed beyond the reach of further discussion. (*Adams v. M’William*, and *Thomson v. Lindsay*, Feb. 27, 1849 (11 S. R., 2d ser., 719).)

1913. The fact of the pauper being possessed of a small



pittance, such as an annuity from a charitable association or the like, will not affect his claim, if it be inadequate to his support. But the reverse is the case if he either possess property or a vested interest, from the sale of which funds sufficient for his support can be realized; or if he have relations in such circumstances as to be able, and in such near degree as to be bound, to support him. In the latter case, however, the pauper will be entitled to temporary relief pending an action against his relatives.

1914. *Relatives Bound to Relieve*.—As this subject has already been treated under the relations of Husband and Wife (*ante*, p. 12), and Parent and Child (*ante*, p. 60), a very brief recapitulation will here suffice.

1915. (1.) *A father* is bound to maintain his children, whether legitimate or illegitimate, so long as they are unable to work, whether the incapacity proceed from infancy, disease, idiocy, or any other cause. This obligation extends to a daughter-in-law during her husband's life; but not after his death.

1916. (2.) The mother, but not the stepmother.

1917. (3.) The paternal grandfather, and other paternal ascendants.

1918. (4.) Sons-in-law, it is believed, are not bound to support their parents-in-law, unless their wives have a separate estate.

1919. (5.) Failing paternal ascendants, the burden of maintaining legitimate children falls on those of the mother.

1920. (6.) Children are liable to maintain their parents, and other ascendants; and in the unusual case of the pauper having both a father and a son capable of maintaining him, the burden lies primarily on the son. The offer of the son to receive the father into his family is not sufficient, if he is able to give him a separate aliment (*Jackson v. Jackson*, 17th Nov. 1825); but the reverse is the case where the father offers to receive the son.

1921. (7.) Collaterals are not bound to aliment each other.

1922. (8.) *Husbands*.—The highest of all obligations is that

which lies on the husband to aliment his wife. We have already mentioned that husbands and fathers deserting their wives and children are liable to be prosecuted criminally, at the instance of the parish on whom the deserted wives or children have become a burden, under the late statute. (Sec. 80.)

1923. (9.) *Bastards*.—The parents are mutually bound to support illegitimate children; the custody during infancy being with the mother.

1924. But the bastard is not bound to maintain his supposed father, and has no claim against his remoter ascendants,—not being, in the eye of the law, a member of their family.

1925. *Settlement*.—The law of settlement has given rise to so many questions of extreme nicety as to the construction of the late and previous statutes, that an incomplete statement of it would be likely only to mislead.

1926. The general rules are:—That children follow the settlements of their parents, and wives and widows those of their husbands; that continuous, though not necessarily uninterrupted industrial residence for five years, gives a claim on the parish in which the industry has been exercised; and that liability rests, in the last resort, with the parish in which the pauper was born.

1927. Besides increasing the period of residence from three to five years, the recent statute introduced another very important change, by declaring that it should be forfeited by mere non-residence and lapse of time; whereas, by the former law, a residential settlement, once acquired, could never be lost except by the acquisition of another. (Sec. 76.)

1928. The following is the well-known section of the Act by which the subject of residential settlements is regulated:—"Be it enacted, that from and after the passing of this Act, no person shall be held to have acquired a settlement in any parish or combination by residence therein, unless such person shall have resided for five years continuously in such parish or combination,

and shall have maintained himself without having recourse to common begging, either by himself or his family, and without having received or applied for parochial relief; and no person who shall have acquired a settlement by residence in any parish or combination shall be held to have retained such settlement if, during any subsequent period of five years, he shall not have resided in such parish or combination continuously for at least one year: Provided always, that nothing herein contained shall be held to affect those persons who, previous to the passing of this Act, shall have acquired a settlement by virtue of a residence of three years, and shall have become proper objects of parochial relief." (Sec. 76.)

1929. The proviso at the end of the section has been held to apply only to paupers possessing settlements who were proper objects of relief at the date of the Act (4th August 1845)—that is to say, who either were on the roll, or entitled to be placed on it, at that date.

1930. *Funds for Supplying Relief.*—These arise from two sources,—1st, Voluntary contributions, mortifications, and the like; 2d, Assessments.

1931. Though compulsory assessments were introduced so early as 1579, the principal fund for the relief of the poor, till a recent period, arose from voluntary contributions.

1932. But a change in this respect, which had been long in progress, has been operated of late with great rapidity. "So ample were the voluntary contributions of the people" (or so shameful the neglect of the poor?), says Mr Smith (*Digest of the Poor Law*, p. 87), "that, prior to the year 1700, there were only three parishes assessed; and down to the beginning of the present century the number did not amount to one hundred." In 1845, when the Poor Law Act was passed, there were still only 230 assessed, and 650 unassessed; whereas in 1860 there were 749 assessed, and only 134 unassessed.

1933. *Church-door Collections* form the major part of the voluntary contributions for the relief of the poor.—By the proclamation of the Privy Council of 1693, it was ordained that one-half only of the sums collected at the church-doors, or otherwise made by the kirk-session, should be paid into the general fund for the relief of the poor. No directions were given as to the application of the other half; but by almost invariable practice it had come to be applied to the purposes of occasional or temporary relief.

1934. On this subject it is enacted by the Poor Law statute (8 and 9 Vict., c. 83), that, “in all parishes in which it has been agreed that an assessment should be levied for the relief of the poor, all monies arising from the ordinary church collections shall, from and after the date when such assessments shall have been imposed, belong to and be at the disposal of the kirk-session of each parish: Provided always, that nothing herein contained shall be held to authorize the kirk-session of any parish to apply the proceeds of such church collections to purposes other than those to which the same are now, in whole or in part, legally applicable.” It is said that under this section the whole collections are now under the entire control of the kirk-session (Smith, p. 30); but the point seemed doubtful to Mr Dunlop (p. 83), and it does not seem to have been formally decided.

1935. The practice, according to Mr Smith, is in some cases to hand over the proceeds to the parochial board for disposal; but “in the great majority of instances, the sums collected are dispensed by the kirk-sessions themselves to the poor of their respective parishes. The persons, however, so assisted are for the most part of a different class from the poor actually chargeable to the parish, being generally individuals who have fallen into temporary difficulties, or become otherwise fit objects of public charity.” (Smith, p. 83.)

1936. Where no assessment has taken place, the former ar-

rangements with reference to the church-door collections remain in force.

1937. *Assessments*.—The 34th section of the Poor Law Act provides, that the parochial boards may resolve that the funds requisite for the relief of the poor shall be raised by assessment, and the 35th section prescribes *three* modes in which it may be raised.

1938. 1st, It shall be lawful for such board to resolve that one-half of such assessment shall be imposed upon the owners, and the other half upon the tenants or occupants of all lands and heritages within the parish or combination, rateably according to the annual value of such lands or heritages; or 2d, to resolve that one-half of such assessment shall be imposed upon the owners of all lands and heritages within the parish or combination, according to the annual value of such lands and heritages, and the other half upon the whole inhabitants, according to their means and substance, other than lands and heritages situated in Great Britain and Ireland; or 3d, to resolve that such assessments shall be imposed as an equal per-centage upon the annual value of all lands and heritages within the parish or combination, and upon the estimated annual income of the whole inhabitants from means and substance, other than lands and heritages situated in Great Britain or Ireland.

1939. The mode adopted (in the vast majority of parishes it has been the first)<sup>1</sup> must be approved by the Board of Supervision. (Sec. 34.)

1940. The subsequent statutes 24 and 25 Vict., c. 37, repeals sec. 34 of the statute here referred to (8 and 9 Vict., c. 83), so far as it allows part of the poor's assessment to be levied on means and substance. Where such mode was in use, Parochial Boards are

<sup>1</sup> In 1860 there were 694 parishes assessed according to the first mode, 9 according to the second, 18 according to the third, and 28 according to local usage.

to meet within two months after the passing of the Act (July 22, 1861), and assess under the first mode of assessment in said 34th sec.

1941. In addition to the modes thus offered to the option of parishes, it is provided that the assessment may continue to be imposed according to any local Act or established usage, if approved by the Board of Supervision. (Sec. 35.)

1942. *Superintendents*.—By the Poor Law Amendment Act of 1856 (19 and 20 Vict., c. 117), the Board of Supervision is empowered to appoint two general superintendents to assist in the execution of the former Act; and such appointments have been made, and are now in operation.

## BOOK III.

### OF THE MACHINERY OF THE LAW.

1943. AN outline of the legal rights and obligations of Scotchmen having now been presented to the reader, as they affect, *first*, the members of the same family, and *second*, the members of the general community in their private relations, we have now to consider briefly, in the *third* place, the methods by which these rights and obligations are ascertained in particular cases, and the means by which they are enforced by the State.

1944. All rights and obligations are ascertained, if doubtful or disputed, by obtaining a decree of a competent court of law, and they are enforced by diligence or execution, that is to say, by calling in the executive power of the State to support and vindicate the decree. The humblest judicature is on a footing of equality with the highest, to the extent of being entitled to vindicate its lawful authority *vi et armis*, that is to say, by calling in the aid of the military, in the last resort.

### CHAPTER I.

#### OF THE SUPREME COURTS AND JUDGES OF SCOTLAND.

##### *The Court of Session.*

1945. The Court of Session is the highest civil tribunal in Scotland. It was instituted in the reign of King James V., by

an Act of Parliament, bearing date the 17th May 1532, for the purpose of discharging the judicial functions which had originally belonged to the King and his Council, and which, since the year 1425, had in a great measure devolved on a committee of the Parliament itself, as the great Council of the nation.

1946. The new court consisted originally of fourteen ordinary judges half spiritual and half temporal,<sup>1</sup> and a president, who in the first instance was a churchman, and who was appointed to act as chairman, except when the Lord Chancellor was present.

1947. The King reserved to himself the privilege of appointing other lords or members of his great Council, to the number of three or four, to sit and vote with the Lords of Session.

1948. The office of Chancellor of Scotland was abolished at the Union in 1707; and the habit of appointing peers to take part in the deliberations of the judges has long since fallen into abeyance, though, when a peer chanced to be present, he is still accommodated with a seat on the bench, as a mark of respect.

1949. From its foundation, down to the year 1808, the Court of Session consisted of one tribunal. In that year, in consequence of "the great extension of agriculture, commerce, manufactures, and population," it was divided into two separate courts, called Divisions, with co-ordinate jurisdiction. (48 Geo. III., c. 151.) The Lord President, who continued to enjoy the rank and dignity of president of the whole Court, and who still discharges very important functions in that capacity, with seven of the ordinary judges, formed the First Division, and the Lord Justice-Clerk, with six of the ordinary lords, the Second Division.

1950. In 1810, the three junior ordinary judges of the First

<sup>1</sup> The practice of appointing churchmen to the bench did not cease immediately after the Reformation.—*Erskine*, vol. i., p. 56.



Division and the two junior ordinary judges of the Second Division were relieved from attendance in the Inner House, and appointed to sit as permanent Lords Ordinary in the Outer House; the quorum in either Division, which had formerly been four, being now reduced to three.

1951. In 1830, the number of judges of the Court of Session was reduced to thirteen (1 Will. IV., c. 69); and the present staff consists of the Lord President, the Lord Justice-Clerk, and eleven ordinary judges.

1952. Of these thirteen judges, four sit in the First Division of the Inner House, viz., the Lord President and three ordinary judges; four in the Second Division of the Inner House, viz., the Lord Justice-Clerk and three ordinary judges; and the remaining five judges officiate in the Outer House as Lords Ordinary,—four sitting daily at the same time, though each in a separate court, and the fifth having what is called a “blank day.”

1953. All ordinary causes are tried in the Outer House in the first instance. The jurisdiction of the Outer House is subordinate to that of the Inner House, except where it has been specially provided by Act of Parliament that the judgment of a Lord Ordinary shall be final.

1954. The last appointed Lord Ordinary officiates in what is called the Bill Chamber, a department of the Court in which summary petitions and applications, and other branches of business requiring unusual despatch, are disposed of; such as suspensions of decrees or of diligence, and suspensions and interdicts of threatened wrongs. An interim interdict, by which the proceeding complained of is arrested till its true nature can be inquired into and discussed by both parties, is granted on the applicant making out an *ex facie* case of injury to the satisfaction of the Lord Ordinary, and becoming responsible for any injury which may be occasioned by the interdict, should it be

ultimately recalled. In general, he has also to find caution for the expenses of the process.

1955. The Bill Chamber is open in vacation,—the judges, with the exception of the Lord President and Lord Justice-Clerk, and Commissioners of Justiciary, officiating in rotation.

1956. It is competent to the judges of either Division, in any cause in which they shall be equally divided in opinion, to direct such cause to be reheard and judged by the judges of the Division before which it depends, “with the addition of three judges of the other Division of the Court.” (13 and 14 Vict., c. 36, sec. 35.)

1957. In cases of great difficulty and importance, a hearing *in presence*, as it is called—*i.e.*, a discussion before the whole thirteen judges—may be ordered; and this is the most solemn proceeding by which a cause can be disposed of in Scotland.

1958. *The judges of the Court of Session* hold their office *ad vitam aut culpam*. They are appointed by the Crown. No one is eligible who has not served as an advocate or principal clerk of Session for five, or as a writer to the signet for ten years. In practice, the judges are invariably chosen from the bar.

1959. *Jurisdiction*.—As the Court of Session was not intended for the decision of trifling causes, the general rule is, that no action for debt can originate in that Court in which the sum sued for is under L.25. Where the action is one not having conclusions for a pecuniary sum, it may be competently brought in the Court of Session, though the interest of the pursuer may not be of the value of L.25. No suspension or advocacy of a judgment of an inferior court is competent, where the value to the pursuer (not including expenses, but including interest) is less than L.25. In all questions of personal status, and competitions relative to heritage, as well as declarators of right to it, the Court of Session has a privative jurisdiction.

1960. In other cases, the judgments of all the inferior courts

of Scotland, except the Small Debt Courts, are subject to review in the Court of Session. There are, however, many statutory exceptions.

1961. Where the facts of a case coming before the Court of Session by advocacy or suspension have been exhausted in an inferior court, it may be carried at once to the Inner House of the Court of Session, without being discussed before a Lord Ordinary. (13 and 14 Vict., c. 36, sec. 32.)

1962. The judgments of the Inner House of the Court of Session may be reviewed in the House of Lords.

1963. It is incompetent to appeal directly from the interlocutor of a Lord Ordinary, unreviewed by the Inner House.

1964. Unless there are reasonable grounds for delay, a petition of appeal must be presented in the House of Lords within two years after decree in the Court of Session; and it must be signed by two counsel, who must certify that, in their opinion, the appeal is not groundless.

1965. *Questions of Fact*.—However it may have stood in former times,<sup>1</sup> there can be no doubt that, from the institution of the Court of Session in 1532 till the institution of the Jury Court in 1815 (55 Geo. III., c. 42), the judges of Session were judges of fact as well as of law; and their original number of fifteen, corresponding to that of a Scottish criminal jury, is supposed to have been fixed upon in order that they might represent the Parliament in its capacity of the great jury of the nation.

1966. *Law and Equity*.—The distinction between law and equity in the English sense has never been admitted in Scotland; and the judges of the Court of Session are consequently judges of both.

<sup>1</sup> The view that, in Scotland, as in all the other nations of Europe, jury trial existed at a very early period, has been supported by legal antiquaries on very plausible grounds. Ivory's *Forms of Process*, vol. ii., p. 259, *et seq.*, and works there referred to; see also Mr Innes's *Scotland in the Middle Ages*, p. 189.

1967. The *College of Justice* includes not only the judges who are properly styled senators, but advocates, clerks of Session, writers to the signet, and all other practitioners and officials connected with the Court of Session, including the Court of Exchequer.

1968. Till recently, the members of the College of Justice were exempted from almost all local taxes and burdens, and possessed many other privileges,—all of which have now been either voluntarily relinquished or withdrawn by statute.

*Of the other Departments of the Court of Session.*

*I.—The Jury Court.*

1969. From its institution in 1815, down to the year 1830, the Jury Court was a judicial establishment altogether separate from the Court of Session.

1970. It consisted of one chief and two ordinary judges,—the latter being at the same time judges of the Court of Session. Their title was “The Lords Commissioners of the Jury Court in Civil Causes.”

1971. The object of the Jury Court was to dispose of such questions of fact as might be remitted to it from the Court of Session, or the Court of Admiralty, which then also existed as a separate tribunal.

1972. The whole arrangements of the Jury Court were borrowed from England, even to the number of the jury itself,—which is still twelve in place of fifteen, as in the criminal jury of Scotland,—and the necessity for an unanimous verdict, which has only been abolished within the last few years. (17 and 18 Vict., c. 59 (1854), *infra*, 357.)

1973. As the first statute (55 Geo. III., c. 42 (1815)) by which it was introduced was regarded merely as sanctioning an experiment, it was declared to have force for only seven years.

1974. Four years afterwards, a second Act was passed (59 Geo. III., c. 35 (1819)), which, proceeding on the preamble that "the extension of trial by jury to civil causes has been attended with beneficial effects to the administration of justice," permanently established the Court, and enlarged the sphere of its jurisdiction.

1975. The institution was further enlarged, and altered in some respects, in 1825. (6 Geo. IV., 120.)

1976. In 1830 (1 Will. IV., c. 69) the Jury Court was incorporated with the Court of Session, and it is now to be regarded merely as the department of that Court in which questions of fact are disposed of.

1977. Jury trials, however, differ from the other branches of business in the Court of Session in this, that they may take place in any circuit town, either before one of the judges of the Court of Justiciary (who are always judges of Session also) when on circuit, or before any other judge or judges of the Court of Session whom either Division may appoint.

1978. Any question of fact which emerges in the course of an action may be sent to a jury; but the classes of cases specially appropriated to jury trial are the following:—All claims for damages on account of injuries done to the person; for libel or defamation; for injury to moveables or lands where the title is not in question; for breach of promise of marriage, seduction, or adultery; and all actions founded on delinquency, or *quasi* delinquency, of any kind, where the conclusion is for damages or expenses only. (59 Geo. III., c. 35, sec. 1.) To this list were subsequently added (6 Geo. IV., c. 120, sec. 28) actions against ship-masters, carriers, innkeepers, and stablers; all actions for nuisances, for reduction of deeds on the ground of incapacity on the part of the granter; all actions on policies of insurance, charter parties, bills of lading, and the like; and actions for the wages of seamen. Causes determined by the Court of Session,

and appealed, are sometimes remitted by the House of Lords, with instructions to send issues to a jury.

1979. In 1850 several very important changes were made in the arrangements for determining questions of fact in the Court of Session. By the "Act to Facilitate Procedure in the Court of Session" (13 and 14 Vict., c. 36) of that year, it is provided (sec. 46), that, "if the parties in a cause in which an issue has been adjusted shall consent to the Lord Ordinary before whom the cause depends trying such issue without a jury, such Lord Ordinary shall, unless the Court, on the report of such Lord Ordinary, shall deem it inexpedient and improper, try such issue without a jury." Within eight days after the proceedings at the trial are concluded, the Lord Ordinary is directed to pronounce an interlocutor, stating "specifically what he finds in point of fact." Such findings in fact may be brought by either party before the Lord Ordinary himself for reconsideration, and he may either correct them or order a new trial; but they can be submitted to the review of the Inner House only on the ground that he has committed an error in law.

1980. It is, besides, rendered competent for the Lord Ordinary, even without the formality of adjusting issues, to pronounce an interlocutor, setting forth distinctly any question or questions of fact which may have arisen in the course of a suit depending before him, and to direct the parties to conduct a proof before him on these specific points. In this case, as in the case of issues being adjusted, his findings are final, under the conditions and limitations just explained.

1981. Still further to facilitate the disposal of questions of fact, the Lord Ordinary, with consent of both parties, or on the motion of one party and with the leave of the Inner House, may order evidence to be taken by commission in any cause not strictly belonging to those set apart by statute (6 Geo. IV., c. 120) for jury trial.

1982. In order to extend the benefits of arbitration, and in some measure to combine them with those of jury trial, it is provided (sec. 50) that parties, by consent, may refer any issue to one, three, five, or seven arbiters, who shall be sworn, and act in every respect as a jury. No new trial is to be granted on the ground of miscarriage in fact; and if granted for error in law, it is appointed to take place before the same arbiter or arbiters.

1983. *The Verdict*.—The statute to which we already referred (17 and 18 Vict., c. 59 (1854)) as abolishing the unanimous verdict of the English jury, provides that, “if the jury are unable to agree upon a verdict, and if, after having been kept in deliberation for six hours, nine of the said jury shall agree, the verdict so agreed to shall be returned as the verdict of the jury;” and further, that “during the said period they may be furnished with necessary refreshment by leave of the judge.” The period of confinement has since been reduced to *three* hours. (22 and 23 Vict., c. 7.)

## II.—*Court of Exchequer.*

1984. The ancient Court of Exchequer, like the modern Jury Court, has recently been absorbed by the Court of Session.

1985. In 1856 it was enacted that the “whole power, authority, and jurisdiction belonging to the Court of Exchequer in Scotland shall be transferred to, and vested in, the Court of Session, and the Court of Session shall be also the Court of Exchequer in Scotland.”

1986. As the previous constitution of the Court of Exchequer has thus become a matter of mere historical interest, a very brief notice of it will suffice.

1987. By the Treaty of Union, in 1707 (Art. 19), it was provided that the Revenue Court of the Kings of Scotland should continue to exist as then constituted, till a new court could be established by an Act of the Parliament of Great Britain. This

object was effected almost immediately (6 Anne, c. xxvi.), and the new Court of Exchequer came into operation on the 1st May 1708. It was formed after the model of the Court of Exchequer in England; and the judges were appointed to be the High Treasurer of Great Britain, with a Chief Baron, and four Barons, who were to be either serjeants-at-law, or English barristers, or Scotch advocates of five years' standing. All barristers were entitled to practise before this Court who could plead either in the Courts at Westminster or in the Court of Session.

1988. The Court of Exchequer, as thus constituted, had privative jurisdiction as to the duties of customs, excise, and other revenues appertaining to the King or Prince of Scotland, and as to all honours and estates which might accrue to the Crown, in which matters the forms of procedure used in the English Court of Exchequer were, under certain limitations, to be adopted. Of these limitations the most important was, that no debt due to the Crown should affect the debtor's real estate in any other manner than as such estate might be affected by the laws of Scotland.

1989. Where trial by jury took place, it was appointed that the number of jurors should be twelve, as in England.

1990. The judgments of the Court of Exchequer were carried to the House of Lords by the English form of writ of error.

1991. The whole superintendence of the feudal property of the Crown in Scotland was also entrusted to this Court; and, as a necessary consequence, the duty of revising and passing the titles of the King's feudal vassals.

1992. The Court further acted as a board for controlling and auditing the accounts of the revenue.

1993. This latter branch of the duties of the Court was transferred to England in 1832, and all accounts relating to the revenue were appointed to be examined, comptrolled, and audited by the Comptroller and Auditor of Excise of the United King-



dom. (2 and 3 Will. IV., c. 103, 11th August 1832.) It was declared that the jurisdiction of the Exchequer as a court of law should not be affected by this statute, and that all debts, duties, and revenues of customs or excise should be recoverable as heretofore.

1994. By a previous Act of the same year, however, that series of changes was commenced which afterwards issued in the abolition of the Court of Exchequer as a separate court. In imitation of the Act (1 Will. IV., c. 69) for abolishing the Jury Court, and uniting jury trial in civil causes with the ordinary jurisdiction of the Court of Session, and in further pursuance of the principle of simplifying and reducing the judicial establishments of Scotland which that enactment had introduced, it was now provided (2 Will. IV., c. 54, 23d June 1832) that no successor be appointed to the Chief Baron, or to the one ordinary Baron whom the Act just mentioned had substituted for the four who constituted the original court; and that, on their decease or retirement, their duties should devolve on a judge of the Court of Session, who should be entitled to an addition to his salary of L.600 a year.

1995. The recent Exchequer Act (19 and 20 Vict., c. 56 (1856)), by which the Court of Exchequer became in reality the revenue department of the Court of Session, thus effected little more than had been previously determined on. But several important changes in the mode of procedure were introduced for the first time. The English forms and terminology hitherto used in the Court of Exchequer were assimilated to those of the Court of Session; and it was provided that interlocutors in Exchequer causes pronounced by the Lord Ordinary, on whom the chief duties were now devolved, may be reclaimed against to the Inner House, and that Inner House judgments in Exchequer causes may be carried to the House of Lords by appeal, as if they had been pronounced in ordinary Court of Session causes.

It had previously (18 and 19 Vict., c. 90 (1855)) been enacted, that costs may be given either for or against the Crown ; but the old preference of the Crown over other creditors was retained, and the "privilege of audience," as it is called, or the right to be heard last, was preserved to the Lord Advocate when pleading on behalf of the Crown, whether before the Court or a jury.

### III.—*Of the Teind Court.*

1996. The judges of the Court of Session sit in the Teind Court every second Wednesday during session, in the capacity of Parliamentary commissioners for the valuation of teinds, and for their application to the support of the Established Church and clergy of Scotland.

1997. In 1617, a commission of the Parliament of Scotland was appointed to plant churches and modify stipends for the Reformed clergy out of the tithes of every parish in the kingdom. Other commissions were subsequently appointed with the same object, and with additional powers. They were authorized to unite and disjoin parishes, to value and sell tithes, to augment stipends, to build new churches, and the like.

1998. By the Act of Union, in 1707, the powers of the last of these commissions, and of all the previous commissions, were transferred to the judges of the Court of Session.

1999. The Teind Court, though it meets in the same place, and is presided over by the same individuals, is nevertheless distinct from the Court of Session, having a special jurisdiction, and a separate establishment of clerks and other officials.

2000. The judgments of the Court of Teinds may be carried by appeal to the House of Lords.

2001. The Teind Court has no power to enforce its own decrees. This is done by the intervention of the Court of Session.

2002. By the Judicature Act of 1825 '6 Geo. IV., c. 120,

sec. 54), a distinction was drawn between the ministerial and the judicial functions of the Court of Teinds. The former, comprising all the discretionary powers formerly vested in the Court, were left on the previous footing; whilst the latter, in all their departments, were transferred to the Court of Session, and are now conducted, as far as possible, like ordinary actions. They are allotted to the Second Junior Lord Ordinary, whose judgments are subject to review in the Inner House.

#### IV.—*Of the Ancient Court of Admiralty.*

2003. The ancient Court of the High Admiral (1681, c. 16, and 1690, c. 15), who was the King's Justice-General upon the seas, possessed supreme jurisdiction, both civil and criminal, in all strictly maritime and seafaring causes. In civil cases this Court possessed power to review its own decrees, but its judgments could not be carried by advocacy to the Court of Session. In criminal cases, even where the crime had been committed on shipboard, if it was not an offence against the laws of navigation, the jurisdiction of the Court of Admiralty was cumulative with that of the Court of Justiciary. Piracy and mutiny on shipboard were thus exclusively cognisable in the Court of Admiralty, whilst murder even at sea might be competently tried in the Court of Justiciary.

2004. This cumulative jurisdiction of the Court of Justiciary was, in 1828, extended to "all crimes and offences whatsoever now competent to be tried in the Court of Admiralty." (9 Geo. IV., c. 29, sec. 16.)

2005. In 1830 (11 Geo. IV., and 1 Will. IV., c. 69), the Court of Admiralty was abolished. Its civil jurisdiction in cases exceeding L.25 was transferred to the Court of Session, whilst those under this amount became competent in the inferior courts. A corresponding arrangement was made regarding its jurisdiction in crimes; those of a serious nature being handed over to

the Court of Justiciary, whilst those of a lighter sort were made competent in the Sheriff Courts.

2006. By the Judicature Act (Geo. IV., c. 120, sec. 68), in 1825, the jurisdiction of the High Court of Admiralty in Scotland, in questions of prizes and captures, had already been vested in the High Court of Admiralty in England.

2007. The duties of the Lord High Admiral were in practice performed by a deputy, who was called the Judge of the High Court of Admiralty.

#### V.—*Of the Ancient Commissary Court.*

2008. The Supreme Commissary Court, which held its sittings in Edinburgh, consisted originally of four judges. It was established by a royal grant of Queen Mary, dated February 8, 1563, and had jurisdiction in actions of divorce, declarators of marriage, nullity of marriage, and all actions which originally belonged to the Bishops' Ecclesiastical Courts.

2009. Its powers having been gradually conjoined with those of the Court of Session, it was finally abolished in 1836 (6 and 7 Will. IV., c. 41); what remained of its jurisdiction, which has been still further abridged by two subsequent statutes (13 and 14 Vict., c. 36 (1850), and 21 and 22 Vict., c. 56 (1858)), being vested in the Sheriff of Edinburgh.

2010. In 1823 (4 Geo. IV., c. 97), the inferior commissariots, which had usually been commensurate with the dioceses, were abolished, and each county was declared to constitute a commissariot, the Sheriff being commissary, excepting the sheriffdoms of Edinburgh, Haddington, and Linlithgow, which continued to constitute the commissariot of Edinburgh.

2011. By the Judicature Act (1 Will. IV., c. 69), the counties of Haddington and Linlithgow were erected into separate commissariots.

2012. "The jurisdiction now left to the Commissary Courts

in Scotland," says Mr Alexander, "is limited to decerning and confirming executors to deceased persons having personal property in Scotland, and relative incidental matters, such as applications for the protection of the property of the deceased till an executor is confirmed, the exoneration of executors and their cautioners, applications for restriction of caution, and the appointment of factors for minors *quoad* executry funds."<sup>1</sup>

#### VI.—*Of the House of Lords.*

2013. As the highest court of appeal in civil causes, the House of Lords, in its judicial capacity, may be reckoned amongst the courts of Scotland.

2014. During the existence of the Scottish Parliament there was much difference of opinion, and several very serious disputes arose, as to the competency of appeals, on the ground that the Court of Session was itself in theory a committee of Parliament.

2015. The right to "protest for remeid of law to the King and Parliament," however; was formally recognised by the Convention of Estates at the Revolution; and though, strangely enough, no provision was made at the Union for appeals to the British Parliament, the right of the subject was held by implication to remain intact in this as in other respects; and, consequently, the duty of dispensing justice in the last resort, which had formerly rested with the Parliament in Scotland, was regarded as transferred to that of Great Britain.

2016. Shortly after the Union, accordingly, the forms in use in appeals from the English and Irish Courts of Equity were adopted in Scotch causes; and in 1709 it was provided, in conformity with the English practice, that execution of the

<sup>1</sup> Practice of the Commissary Courts in Scotland, 1858. To the first chapter of this work the reader is referred for a very interesting sketch of the history, constitution, and jurisdiction of the Commissary Courts.

sentences of the Court below should be arrested whilst appeals were pending.

2017. Till the recent changes there were three courts in Scotland, the judgments of which might be carried directly to the House of Lords,—the Court of Session, the Court of Exchequer, and the Court of Teinds. The amalgamation of the Exchequer with the Court of Session (*ante*, p. 417) has now reduced their number to two.

2018. As to Court of Session cases, the general rule is, that none but final judgments of the Inner House, exhausting the whole merits of the cause, are subject to appeal; but where leave is given by the Court, or where the judges have differed in opinion, it is competent to bring even interim, or interlocutory judgments as they are called, before the House. When the latter class of judgments are appealed from, the existence either of one or other of the reasons we have mentioned must be certified by two counsel who conducted the case in the Court of Session.

2019. There is no appeal from the sentences of the Court of Justiciary, nor from the verdict of a jury, even in a civil cause; though, in the latter case, it is competent to bring the directions of a judge in point of law under review of the House of Lords.

2020. The judgments of the House of Lords are carried into execution by presenting authentic copies of them to the Court of Session, with a petition praying that they may be applied by that Court. The procedure is then regulated by the forms of the Court of Session.

#### VII.—*Of the Court of Justiciary.*

2021. The High Court of Justiciary is the Supreme Criminal Court of Scotland. It was constituted, in its present form, in 1672. (1672, c, 16.)

2022. Its president is the Lord Justice-General, an official to whom the criminal jurisdiction formerly vested in the King's

Justiciar was confided after the institution of the College of Justice. Until recently, the office of Justice-General was held by a nobleman, who was not necessarily a lawyer; but it has now been conjoined with that of Lord President of the Court of Session. (11 Geo. IV., and 1 Will. IV., c. 69, sec. 18.) In the absence of the Lord Justice-General, the Lord Justice-Clerk is president of the Court of Justiciary.

2023. Five other Lords of Session, appointed to act as Lords Commissioners of Justiciary, constitute the ordinary judges of the Court, three being a quorum.

2024. The Lord Advocate,<sup>1</sup> the Solicitor-General, and four Advocates-depute, act for the Crown as prosecutors in the Court of Justiciary. The private party injured may also prosecute in his own name; but this mode of proceeding is nearly unknown in Scotland beyond the precincts of the Police Court,—crimes in all the higher criminal courts being almost invariably prosecuted by the public officers of the Crown.

2025. Trials in the Court of Justiciary are always conducted with the aid of juries, which consist of fifteen men, in place of twelve as in England and in civil cases in Scotland; and their verdicts are returned by a majority, which is also at variance with the English practice. The verdict of “not proven” is another feature in which the criminal law of Scotland differs from that of England.

2026. It is competent for the jury to return a special verdict,—that is, to find certain facts proven, leaving it for the Court to determine whether or not they amount to the crime charged;

<sup>1</sup> A very interesting historical notice of the office of Lord Advocate in Scotland, by the late Lord Medwyn, will be found in *King's Advocate v. Lord Douglas*, Dec. 24, 1836, 15 Shaw, p. 325. See also, on the subject of a public prosecutor of crimes, Montesquieu, vol. i., p. 108; Grotius, *de Jur. Bel. et Pac.*, Lib. I. iv., sec. iv. 2; Hume's *Criminal Law*, vol. ii., p. 127; Berenger, *de la Justice Criminelle*, cap. iv., p. 257; Thibaut, *Instit.*, p. 167; Stephens's *Com.* ii. 517, and iv. 421.

but verdicts of this kind are now very rarely resorted to. The practice of the jury writing out their own verdict before delivering it, has now been abolished; it being found that much ambiguity is avoided, and the object of the jury more satisfactorily attained, by entrusting that duty to the clerk of Court. But written verdicts may still be resorted to on the direction of the Court, in the case of the jury remaining in deliberation for an unusual time. Where the written verdict is resorted to in such circumstances, it is sealed up by the jury, who are then at liberty to disperse. (9 Geo. IV., c. 29, sec. 15.) But in practice the verdict is almost always delivered by the foreman of the jury orally; it is then committed to writing by the clerk, under the eye of the judge, and read over to the jury for their approval.

2027. No appeal lies to any court from a decision of the Court of Justiciary; and this applies not only to cases in which the decision is a fact arrived at with the aid of a jury, but to those in which it is a point of law determined by the Court.

2028. Neither can the Court of Justiciary review its own judgments. It has the power of reviewing the decisions of all inferior criminal courts, though not to the effect of setting aside the verdict either of an inferior judge or of an assize, on the ground that it is contrary to evidence. It is regarded as the province of the jury in all cases, and their province exclusively, to weigh the evidence submitted to their consideration; and no process is recognised in Justiciary similar to the very questionable one of setting aside a verdict as contrary to evidence in the civil courts. But it is the province of the Court, on the other hand, to decide whether the evidence laid before the jury was legal and competent; and it will consequently inquire into the correctness of a decision of an inferior criminal court which is challenged on the ground of a witness having been erroneously received, an incompetent question put, or a document wrongly admitted.



2029. Except in those crimes which are punishable with death or to which a statute has attached a particular punishment, the Court of Justiciary is invested with arbitrary powers, and may inflict any punishment, from fine to transportation for life.

2030. Peers are amenable to the Court of Justiciary for all ordinary crimes ; but for treason, or any other felony, they can be tried only by a Court of their own order, assembled by the Lord High Steward.

2031. It can neither try soldiers for military, nor clergymen for ecclesiastical, offences. The crime of treason is also excluded from its jurisdiction.

2032. The Court has frequently asserted its authority to punish innominate offences, which, though clearly criminal in their character, have not been hitherto punished as crimes. This function, however—treading, as it does, very closely on the borders of legislation—is one which the Court exercises with very great caution.

2033. The Judges of Justiciary hold circuits twice a year, in spring and autumn ; and for this purpose Scotland is divided into a Southern, a Western, and a Northern District. (1672, c. 16.)

2034. The Southern Circuit is held at Jedburgh, Ayr, and Dumfries ; the Western at Glasgow, Inverary, and Stirling ; and the Northern at Perth, Aberdeen, and Inverness. A third Circuit Court for the Western District, for the despatch of criminal business only, is held at Glasgow during the Christmas recess.

2035. Two judges are usually present in a Circuit Court, but it is competent for one to sit and despatch business.

2036. There is no appeal from a Circuit Court ; but the Court itself may certify a case commenced before it to the whole Court of Justiciary for consideration.

2037. Till recently the Circuit Courts exercised an important though limited civil jurisdiction ; appeals to them from certain of the inferior courts being competent, when the sum in dispute did

not exceed L.25. The decision of the judges in these cases were final. But the Sheriff Court Act (16 and 17 Vict., c. 80, sec. 22) has restricted this power of review to cases under the Small Debt Act not exceeding L.12.

2038. In determining whether ordinary offences, such as theft, shall be tried by the supreme or by the inferior criminal courts, the officers of the Crown are guided quite as much by the number of previous convictions against the prisoner as by the extent or character of the offence then under consideration.

## CHAPTER II.

### OF THE INFERIOR COURTS OF SCOTLAND.

#### I.—*Of the Sheriff Court.*

2039. *Sheriff*.—Notwithstanding its accidental resemblance to an Arabic title of honour, the name, as well as the office of Sheriff, is unquestionably of Teutonic origin. The name is derived from the Saxon words *Schir*, a division or section of the country, a shire, from *Scheran*, to divide, cut, or shear; and *Gerefa*, the same as the German word *Graf*, a Prefect or Comes, from the Saxon *reafan*, to levy or seize,—the *Gerefa* having been probably a fiscal officer. From the latter word comes also the *reve* of former, and the *greve* of present times.

2040. As regards the office, it is believed (Kemble's Saxon in England, ii., p. 151) that in Anglo-Saxon England the Scir-geréfa acted as the deputy of the Ealdorman or Earl, presided in his absence, in the County Court (*scirwitan*), and sometimes acted as his legal assessor, both in that assembly and when he chanced to preside in his court as a civil or criminal judge; and it would seem that he stood in the same relation to the bishop,

and performed the same functions in his court. In Scotland, the corresponding duties were discharged by the King's Sheriff; it having been enacted at a very early period, that "neither bishops nor abbots, nor yet earls nor barons, nor any freeholder, shall hold their court unless the King's Sheriff or his servants be there, or summoned to be there, to see that the court be righteously led;" and also that barons, knights, and freeholders, and the stewards of bishops, abbots, and earls shall attend the Sheriff's court, which is to be holden at the beginning of every forty days. (Assise Reg. Willel. Scots Acts, Thomson's ed., pp. 53, 55, and Reg. Maj. iv. 11; Innes's Scotland in the Middle Ages, p. 55; Balfour's Practicks 15, *et seq.*)

2041. It is probable that Sheriffs were known in Scotland from the commencement of what has been called the Scoto-Saxon period of our history (Chambers' Caled., i., p. 715), and that one of the many legal reforms of David I. consisted in extending them over the country (preface to Acts of Parliament, Thomson's ed., p. 31; Assise Reg. David, *ib.*, pp. 7, 9). Down to the war of the succession, the officers of the law, like the law itself, were for the most part identical in the two countries. There were coroners, and mayors, and aldermen in Scotland as well as in England; who, after the French connection, gave place with us to provosts and procurators-fiscal.<sup>1</sup> The change was a very gradual one, the old titles, as will be seen from the statutes, being retained long after the new ones were introduced, and continuing, indeed, almost to the time when the English connection was restored by the accession of James VI. (1424, c. 42; 1426, c. 71 and c. 75; 1436, c. 139; 1449, c. 21.) The crowner continued down to a late period (1528, c. 5; 1535, c. 34), and the alderman to a still later (1540, c. 89 and 91). The title of the Sheriff was retained in Scotland, but by

<sup>1</sup> See a treatise on the office of Procurator-Fiscal in Riddle's Peer and Con. Law, p. 1002; Fraser, i., p. 656.

degrees his functions, which originally were, no doubt, the same as in England, underwent various changes.

2042. When our authentic statute law commenced with the reign of James I., the three officers, by whom a county was governed, irrespective of the King's Judiciars, the Lords of Regality and Barons, with their Baillies or Sheriffs, were the King's Lieutenant, the King's Sheriff, and the Sheriff's Depute.

2043. In 1438 (c. 3), the Lieu-tenant is spoken of as an existing officer, and commanded to "raise the country" whenever it may be necessary to bring the rebellious and unruly possessors of castles and fortalices into subjection; and in 1449 (c. 10) it is enacted, that where the Sheriff's decrees are resisted he may denounce the parties openly to the Lord Lieu-tenant, whilst, on the other hand, if the Sheriff refuse to do his duty, the party spolied (plundered) may complain of the Sheriff to the Lieu-tenant, in which case the Lieu-tenant shall deal with the Sheriff as the Sheriff ought to have dealt with the spulziers. In the Act which immediately follows, the Sheriff is spoken of as the King's Sheriff, and empowered to carry the provisions of the preceding Act into effect within the regalities or jurisdictions held in connection with lands.

2044. From these enactments it appears (1) that the King's Sheriff, as distinguished from the Sheriffs or Baillies of the Lords of Regality, was an officer appointed by the Crown, and (2) that though, in some respects, subject to the authority of the King's Lieutenant or Warden (1581, c. 81), he was not his depute. The Lord-Lieutenant, like the old Commissioners of Array in England, was perhaps only a temporary officer, constituted in times of danger, or placed over districts which were actually disturbed; and it seems certain that his functions, like those of the Great Constable, and the Constables of the King's Castles, were executive rather than judicial, though, like them (Jeffrey's Roxburghshire, vol. ii., pp. 45, 47, 48), he may occa-

sionally have exercised the powers of the Sheriff, or overruled his decisions. When the king had occasion to appoint a Lieutenant for a particular shire, it is natural to suppose that he would generally choose the *Comes*, or lord of the district; and the term *Vice-Comes*, by which our early Latin writers always designate the Sheriff, would seem to indicate that a more intimate relation than that which afterwards prevailed, subsisted originally between the offices of Lord-Lieutenant and Sheriff. At present they are entirely independent.

2045. *Sheriff-depute*.—The office of Sheriff having very early become hereditary (Ryley's *Placita*, 504; Chalmers' *Caled.* i. 715; Innes's *Sketches of Early Scottish History*, pp. 399 and 465), and continuing to be so, notwithstanding the provisions of the Act 1455, c. 44; it became necessary to provide that if any Sheriff was unable or unapt to use and exercise his office in person, he should present to the King "ane sufficient depute," for whom he shall be answerable. (Skene, *de Verborum significatione*, and Acts quoted, *voce* Schireff.) These deputies, as well as their clerks, the Sheriffs were enjoined to send yearly, on 1st November, to the Lords of the Session, to be examined and admitted by them. It thus appears that the office of the original Sheriff-depute corresponded very nearly to that of the modern Sheriff-substitute; and in this position matters remained till the passing of the Heritable Jurisdictions Act in 1747.

2046. By that enactment (20 Geo. II., c. 43) the hereditary Sheriffs were abolished, and their judicial powers transferred to officers to be appointed by the Crown. These newly created Sheriffs were to hold their offices at first for a period of seven years, and afterwards *ad vitam aut culpam*. But the Crown retained the power of appointing Sheriffs for one year (sec. 5), who should exercise no jurisdiction (sec. 30), but who were to be known by the name of Principal or High Sheriff,—titles previously unknown to the judicial nomenclature of Scotland.

2047. The honorary office thus created, probably in imitation of the English High Sheriffship, was occasionally combined with that of Lord-Lieutenant, when that office was placed on a new footing by the Militia Acts. (42 Geo. III., c. 90, 91.) But the only practical result of its existence seems to have been, that it led to the term *depute* being retained by the officers henceforth entrusted with the jurisdiction which formerly had belonged to the hereditary Sheriff. The custom which thus arose has fallen into disuse since the passing of 9 Geo. IV., c. 29, sec. 22, which provides that the Sheriff-depute may be addressed by the title of Sheriff, without the term *depute* being added.

2048. The officer now called the Sheriff, formerly known, for the reasons just explained, as the Sheriff-depute, and sometimes, in violation of 20 Geo. II., c. 43, sec. 30, called, even in Acts of Parliament, Sheriff-principal, to distinguish him from the Sheriff-substitute, must be a member of the bar of at least three years' standing. Practically, he is always of much older standing. He usually resides in Edinburgh, and continues to practise as an advocate. He is bound by Act of Parliament to hold certain stated sittings within his county every year. (16 and 17 Vict., c. 80, sec. 46.) The Sheriffs of Edinburgh and Lanark are resident, and do not continue to practise at the bar.

2049. The Sheriff's jurisdiction within his own district, both in civil and criminal matters, was at first very nearly as extensive as that of the King's Justiciar over the whole kingdom. Even previous to the institution of the College of Justice, however, various causes conspired to limit it, and on that event it assumed pretty nearly the dimensions which have since belonged to it.

2050. At present the civil jurisdiction of the Sheriff extends to all personal actions,—on contracts, bonds, bills, or other personal obligations, to whatever extent,—to actions of damages, actions for rent, furthcomings, poindings of the ground, etc. He may also judge in possessory actions connected with land rights

to the greatest extent; but questions of heritable title, whether tried by declaratory or recessory actions, are competent only in the Court of Session; as are also actions relative to personal status,—*e. g.*, declarators of marriage, nullity of marriage, divorce, separation *a mensa et thoro*, legitimacy, etc., which are now privative to the Court of Session, as coming in place of the Commissaries of Edinburgh.

2051. The Sheriff has extensive duties entrusted to him by the Bankrupt statutes; and he has many other incidental duties, both judicial and ministerial, to perform, to which allusion will be made in the following pages.

2052. The criminal jurisdiction of the Sheriff within his county was formerly almost unlimited. Latterly, what are called the four pleas of the Crown—viz., murder, robbery, rape, and wilful fire-raising—have been considered competent only in the Court of Justiciary.

2053. The Sheriff cannot pronounce a sentence of transportation; and his jurisdiction from very early times has been confined within the limits of his county (Skene, *de Verborum significatione*, *v.* Schireff; Balfour's *Practices*, p. 17). But to these rules there are some partial exceptions. The Prison Act of 1839 (2 and 3 Vict., sec. 27) extended the Sheriff's jurisdiction to the effect of enabling him to send prisoners sentenced to one year's imprisonment or upwards to the General Prison at Perth; and by the recent Lunatics Act (20 and 21 Vict., c. 71, sec. 85), he is empowered, in case there shall be no asylum within his jurisdiction, to commit dangerous lunatics to an asylum in an adjoining county. Doubts have even been entertained whether another section of the statute (sec. 34 (1857)) does not extend this power to the granting of orders for admission into asylums on medical certificates, in cases where there is no such immediate necessity for interference.

2054. Crimes of a serious kind are tried by the Sheriff with

the aid of a jury ; the circumstances in which this mode of trial, or the summary one before himself, are to be made use of, being for the most part either prescribed by statute or by the Acts of Adjournal of the Court of Justiciary. It is not considered "safe to try any case without a jury, where the charge is of such a kind as to warrant, if proved, more than sixty days imprisonment." (Barclay's edition of M'Glashan's Sheriff Court Practice, p. 11.)

2055. The ordinary prosecutor in the criminal courts of the Sheriff is the Procurator-Fiscal (*ante*, p. 427), who stands to them very much in the same relation that the Lord Advocate does to the Court of Justiciary.

2056. *Sheriff-substitute*.—This title was introduced into Scotland by 20 Geo. II., c. 43, sec. 29, in consequence of the title of Sheriff-depute being retained by the successor of the hereditary Sheriff, as explained above.

2057. In each county there is at least one Sheriff-substitute, who is appointed by the Sheriff, with the approval of the two heads of the Supreme Court, the Lord President and Lord Justice-Clerk. The Sheriff-substitute is not removeable by the Sheriff-depute, nor does the appointment of the latter fall with the death of the former.

2058. Not more than two Sheriff-substitutes additional to those existing at the date of the passing of the Sheriff Court Act (15th August 1853) may be appointed in each county, on authority granted by the Crown on the joint recommendation of the Lord President, the Lord Advocate, and the Lord Justice-Clerk, provided that the recommendation shall expressly bear that the appointment is essential for the public service. (16 and 17 Vict., c. 80, sec. 37.)

2059. The Sheriff-substitute must be either an advocate, a writer to the signet, a solicitor before the Supreme Courts, or a procurator before a Sheriff Court, of at least three years' stand-



ing. Of late years Sheriff-substitutes have been mostly chosen from the bar.

## II.—*Sheriff Small Debt Courts.*

2060. The Sheriffs and Sheriffs-substitute, though not the exclusive, are now the most frequent judges in those courts, in which the smaller kind of civil actions are disposed of.

2061. In small debt actions, the prosecutor and defender state the facts of the case verbally to the judge, and adduce proof where necessary. The intervention of an agent is inadmissible except with permission of the judge, and the cause of granting leave must be set forth. When the statements and proofs are concluded, the judge for the most part gives a decision at once, in presence of the parties, and in open court, stating his reasons more or less in detail as he may see expedient. Should he consider his information to be defective, however, in point of fact, or wish to consider the points of law which may have arisen, he may adjourn the cause.

2062. No record is kept either of the statements or of the proof; the names of the parties and the sums decerned for being all that is committed to writing. The decisions in this form are entered in a book kept by the clerk of Court, and subscribed by the judge. These decisions are final, that is to say, they are not subject to the review of any court on the merits.

2063. The appeal to the Justiciary or Circuit Court, formerly mentioned, is competent only on the ground of corruption, or malice and oppression, or on such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from being done, or on incompetency, including defect of jurisdiction of the Sheriff. By these provisions, parties in small debt causes before the Sheriff are effectually protected from being brought into expensive processes before the Supreme Court on mere questions of form.

2064. By the recent Sheriff Court Act (16 and 17 Vict., c. 80, sec. 26 (15th August 1853)), the jurisdiction of the Sheriff's Small Debt Court was raised from L.8, 6s. 8d. to L.12. The Small Debt Act of 1837 (1 Vict., c. 41, sec. 23) rendered imperative the holding of Circuit Small Debt Courts by the Sheriffs or their substitutes in every county, at the times and places mentioned in the schedule to the Act. The frequency of these judicial visits varies according to the amount of business at the different places; the greatest number being twelve, and the smallest two. The times and places of holding these courts may be changed by the Sheriff, with consent of one of Her Majesty's principal Secretaries of State.

2065. The recent alterations which have been made in the law of evidence in Scotland have greatly facilitated the conduct of business in these courts. Witnesses are now "admissible notwithstanding relationship to the party adducing them" (3 and 4 Vict., c. 59); they are not "excluded by reason of crime" (15 and 16 Vict., c. 27), though they may be examined on any point affecting their credibility (*ibid.*); either party may be examined either for or against himself (16 and 17 Vict., c. 20); and an agent in a cause may be examined, "even though he shall at the time when he is so adduced be acting as agent" (*ibid.*).

2066. The only exceptions still retained to the now almost universal admissibility of witnesses, are, that neither parties themselves, nor their husbands or wives, shall be competent or compellable to give evidence in criminal proceedings in which they are accused, nor to answer questions in a civil suit tending to criminate themselves or each other, or to reveal matters which they have communicated to each other during marriage.

2067. The small debt jurisdiction of the Sheriffs has arisen merely as a substitute for the summary jurisdiction formerly vested in justices of the peace and magistrates of burghs; and the extent to which it has been increased since its first institu-

tion, little more than thirty years ago, is the best proof of the benefits which it has conferred on the public.

### III.—*Sheriff's Police Court.*

2068. In Edinburgh the Sheriff has, by special statute, a police jurisdiction, which is cumulative with the ancient jurisdiction of the civic authorities.

2069. The Sheriff's Police Court there performs criminal functions which correspond in many respects to the civil functions which belong to the Small Debt Courts; and its jurisdiction is for the burgh, almost identical with that of the Sheriff's Summary Courts for counties. No record is kept of the evidence in the Police Court. The period of imprisonment which may be there awarded is limited to sixty days.

### IV.—*Burgh Courts.*

2070. "Magistrates of boroughs have the cognisance of debts and questions of possession between the inhabitants; and it is the general opinion that royal boroughs have as extensive a civil jurisdiction within the borough as the Sheriff hath in his territory." (Erskine, B. i., tit. iv., sec. 21.) Though this jurisdiction, even where it has not been transferred to the Sheriff, has in a great measure fallen into disuse, courts for the disposal of civil cases are still held by the magistrates in all the burghs of Scotland. Where the criminal jurisdiction of the magistrates is cumulative with that of the Sheriff, as in Edinburgh, the burgh is itself a sheriffdom. In some burghs the magistrates are constituted by their charter justices of the peace;<sup>1</sup> in which case they have, within their bounds, a jurisdiction similar to that of the county justices in the rest of the county.

<sup>1</sup> By the Act 1587, c. 82, by which justices of the peace were originally appointed, it was provided that "four of the council of every burgh" should be justices.

2071. Special justices of the peace for the city of Edinburgh are now appointed under the Police Act. (11 and 12 Vict., c. 113, sec. 252.)

2072. In Edinburgh the magistrates are admirals of the ports of Leith and Newhaven; and their jurisdiction extends half way across the Firth of Forth, and embraces "all maritime affairs and actions." Latterly this jurisdiction has been confined to a superintendence which the magistrates exercise over the dredging of oysters. In burghs, the magistrates alone act as bailies in giving sasine and receiving resignations of property held burgage.

V.—*Dean of Guild's Court.*

2073. The Dean of Guild is the head of the Guild Brethren, or Merchant Company of the city. Formerly he was a judge in such mercantile and maritime causes as arose within the burgh, but he has long ceased to exercise jurisdiction in these matters. It still belongs to him, however, to "take care that buildings within burgh be agreeable to law, neither encroaching on private property nor on the public streets or passages; and that houses in danger of falling be thrown down." The Dean of Guild exercises his authority in a court of which he is either the sole or the principal judge. (Ersk. i. 4. 25.)

2074. No building within the old or extended royalty of Edinburgh can be erected, or taken down, or materially altered, without a warrant from the Dean of Guild Court, which is only granted after the neighbouring proprietors of the applicant and others interested have been cited, and had an opportunity of being heard for their interests. The Dean of Guild's jurisdiction does not extend to that portion of the burgh brought under the magistrates' jurisdiction by a recent statute. (19 and 20 Vict., c. 32, sec. 3 (1856).)

VI.—*Justice of Peace Courts.*

2075. The office of Justice of the Peace is of English origin.

2076. It was introduced into Scotland in the reign of King James VI., by the same statute (1587, c. 82) by which circuits for the despatch of criminal business were instituted; and the justices were entrusted with the double duty of bringing offences of the graver sort before the judges, and of trying and disposing of those of a more venial kind “at their courts and meetings to be kept four times every year.” These courts were the origin of our present Quarter Sessions. But it was during the Protectorate of Cromwell that the office was put on its present footing. The rules by which it has ever since been regulated were prescribed by an Act which was passed immediately after the Restoration (1661, c. 38), and in which the Instructions of the previous year were embodied.

2077. By the Eighteenth Article of the Treaty of Union, the justices of the peace in Scotland were invested with the same powers in matters connected with excise and customs which were previously possessed by the justices in England; and by a subsequent statute (6 Anne, c. 6, sec. 2), their criminal jurisdiction was also assimilated to that of the English justices; the Scottish forms of trial, however, being retained.

2078. The commission by which justices of the peace are appointed, falls by the demise of the Crown.

2079. Several officials—such as the judges of the Court of Session, the Lord Advocate, and the Solicitor-General, and all Sheriffs and Sheriff-substitutes—are included in every commission of the peace.

2080. No solicitor or procurator in any inferior court can act as a justice of the peace. (6 Geo. IV., c. 48, sec. 27.) By a recent statute (19 and 20 Vict., c. 48), it is provided that where any such person shall be elected to the office of magistrate or

Dean of Guild in a burgh, the Magistrates or Dean of Guild of which are *ex officio* justices of the peace, he shall be entitled to act as a justice during his tenure of office, provided he, and any partner or partners he may have, shall cease to practise before any Justice of the Peace Court in the county within which the burgh lies.

2081. The antiquated form of commission still in use was drawn up in England in the thirty-third year of the reign of Queen Elizabeth (1590).

2082. No qualification of rank or property is required by a justice of the peace in Scotland, and he receives no pecuniary recompense. He is reimbursed by the county for the sums actually expended by him in the public service.

2083. The regular days for holding Quarter Sessions are, the first Tuesday of March, May, and August, and the last Tuesday of October.

2084. Petty Sessions are called when required by the clerk of the peace.

2085. Quarter Sessions have the power of reviewing the judgments of the justices in Petty Sessions.

2086. Two justices are a quorum; though in some of the larger counties it is a rule, that a greater number shall be present at Quarter Sessions.<sup>1</sup>

2087. One justice cannot act as a judge, though he may grant a warrant to apprehend an accused party, and bring him before himself for examination, or before a court of two or more justices for judgment.

2088. An appeal to the Circuit Court of Justiciary is competent both from the Petty and Quarter Sessions, when exercising their ordinary jurisdiction. Where they are acting under a statute, the existence or non-existence of an appeal is generally regulated by its provision. Where there is no provision, the right of appeal exists.

<sup>1</sup> Barclay's Digest of the Law of Scotland for Justices of the Peace, p. 558.

2089. The chairman of a bench of justices has no double vote ; and in case of equality, one of the justices retires, or another is called in.

2090. The judicial powers of justices of the peace are restricted to the county for which they are appointed ; but they may receive affidavits, ratifications by married women, and the like, anywhere in Scotland,—these being voluntary acts.

2091. The jurisdiction of justices of the peace in Scotland may be said to be wholly statutory.

2092. In the recovery of servants' wages it extends to any amount, "if the servants please rather to pursue before them than any other judge." (Stat. 1661, c. 38.)

2093. Actions for aliment of bastard children are sometimes brought before the justices ; but these cases are competent only where the paternity of the child is admitted.

2094. Warrants against debtors, as *in meditatione fugæ*, are frequently granted by justices of the peace.

2095. The justices are also in use to ordain parties to find surety to keep the peace. This proceeding, which in the legal phraseology of Scotland is called "a warrant of law-burrows," was more common in former times, when the police regulations were less complete than at present.

2096. It has never been the custom for justices of the peace in Scotland to try criminal cases by a jury, as is common in England. Practically, their criminal jurisdiction is confined to breaches of the peace and trifling assaults ; and it is rare for them to inflict a heavier punishment than a small fine or a short imprisonment.

2097. In a case in which the justices imposed a heavy fine for fraud and wilful imposition, the Court of Justiciary remarked that it was not a proper case for their jurisdiction (Watson and Ramsay *v.* Meek, 27th Jan. 1813); and the same observation has been made in other cases.

2098. The Act 19 and 20 Vict., c. 48 (July 14, 1857), assimilates proceedings before justices of the peace and magistrates of burghs to those in the summary trial of offences before the Sheriff, and extends to them the powers conferred on him by 14 and 15 Vict., c. 27, and 17 and 18 Vict., c. 86, in regard to whipping juvenile offenders and imposing hard labour.

2099. The justices possess various statutory powers in reference to revenue matters, highways, fishings, game, public-houses, and the like. Under some of these the jurisdiction of the justices is exclusive; under others, it is cumulative with that of the Sheriff.

2100. The duty of granting licenses to publicans to sell excisable liquors to be consumed on the premises, is exercised by the justices in counties, and by the magistrates in royal burghs, at half-yearly meetings appointed to be held for the purpose. (9 Geo. IV., c. 58.) If there are not a sufficient number of magistrates in a burgh, the justices are empowered to act for them.

2101. As these certificates are in force only for one year, their constant renewal, and the inquiries that are requisite regarding them, cause a great amount of labour to such justices as are conscientious in the discharge of this part of their duty.

2102. Complaints for the violation of this Act are competent either before the Sheriff, the Court of a royal burgh, or two or more justices of the peace.

#### VII.—*Justices' Small Debt Courts.*

2103. It is chiefly as judges under the various Acts which have been passed during the last seventy years (the first is 35 Geo. III., c. 123 (1795)), to facilitate the recovery of small debts, that the civil jurisdiction of the justices of the peace is practically exercised.

2104. The existing code for their guidance in this branch of



their duties is 6 Geo. IV., c. 48 (1825), amended by 12 and 13 Vict., c. 34 (1849).

2105. By the first of these Acts the jurisdiction of the justices is confined to cases not exceeding L.5 (sec. 2), and this provision remains unaltered.

2106. The recent statute, by which the jurisdiction of the Sheriffs in their Small Debt Courts is raised from L.8, 6s. 8d. to L.12 (16 and 17 Vict., c. 80, sec. 26), has no application to the Small Debt Courts either of justices of the peace or of magistrates of burghs.

2107. Parties state their own cases in these courts *viva voce*, and no record is kept either of the arguments or of the evidence.

2108. Procurators cannot practise in them, even with leave of the justices. (6 Geo. IV., c. 48, sec. 5.)

2109. The decrees of the justices in their Small Debt Courts are subject to review on grounds of malice and oppression. (Ibid., sec. 14.)

2110. *The Clerk of the Peace* is not properly an assessor to the justices; but practically, his opinion is usually asked and followed in matters of law. He is appointed by the Crown.

### VIII.—*The Court of the Lord Lyon.*

2111. As chief herald for Scotland, the Lord Lyon, or as he ought rather to be called, the Lyon King of Arms,<sup>1</sup> exercises

<sup>1</sup> The now prevalent custom of speaking of the *Lord Lyon*, though not entirely destitute of the countenance of earlier usage, seems to have arisen from the accidental circumstance of the present holder of the office, and his immediate predecessor, being Peers. In 1587, c. 46, he is throughout called "the Lyon" simply, though the Act speaks of the "Lords of Council and Session;" the same is the case in 1592, c. 127. But in 1662, c. 53, an Act which never passed the seals, and which was rescinded by 1663, c. 15, he is twice called the *Lord Lyon*, and he is so called also in the repealing statute. The old form, however, is reverted to in the important Act 1672, c. 21, by which the office and court of "the Lyon" were placed on their present footing after the Restoration.

jurisdiction over all other heralds, pursuivants, and messengers-at-arms. He admits them to office, superintends them in the discharge of their duties, takes cognisance of complaints against them, and suspends them or deprives them of office when guilty of malversation. (As to cautioners for messengers-at-arms, see *ante*, secs. 1724-5.)

2112. The Lyon is also empowered by the statutes 1592, c. 127, and 1672, c. 21, "to inquire into the relationship of the younger branches of families, having right to coat armour, who desire to have the family arms assigned to them with differences, to assign suitable differences to them accordingly, and to matriculate them in the register of the office, without which the arms cannot lawfully be borne by them." (Report of the Commissioners on the Courts of Scotland, Lyon Court, p. 15.)

2113. The present register, kept in the Lyon office, commences in 1672; but that of Sir David Lindsay, of which the original is in the Advocates' Library, is also regarded as forming part of the authentic records of the Lyon Court. The portion of the record having reference to the intermediate period, is believed to have formed part of the records contained in the 85 hogsheads which were lost at sea when being returned to Scotland in 1661. (See proceedings relating to the Records of Scotland, Thomson's edition of Acts of Parliament, vol. i., p. 25.)

2114. It further belongs to the Lyon, in virtue of the powers conferred on him by the statutes above mentioned, to grant new coats of arms to "virtuous and well-deserving persons;" which coats it is his duty to adjust, according to the discretion vested in him, but conforming to the laws of arms and the usages of Scottish heraldry. It is also the duty of the Lyon to enforce the penalties imposed by these Acts on those who unlawfully assume coat armour.

2115. In his judicial capacity, it is the duty of the Lyon to investigate and decide upon claims to particular coats of arms

or armorial distinctions, such as supporters and the like, and to determine any disputes regarding coat armour which may arise between individual claimants.

2116. In granting new armorial bearings, the Lyon exercises a part of the royal prerogative, and his acts are ministerial and discretionary, not judicial. For this reason, so long as they do not trench on vested rights, they can no more be questioned in a court of review than can the act by which the sovereign directly confers a title of nobility. But the case is different where the Lyon grants to one person arms which another claims a right to bear. Here a question of property arises, and there can be no doubt of the jurisdiction of the Court of Session to entertain an action at the instance of the party alleging himself to be aggrieved. (*M'Donnell v. M'Donald*, Jan. 20, 1826; *Cunningham v. Cunningham*, 13th June 1849.) In the former of these cases, Lord Pitmilley remarked, that "even if the Lyon refuse arms to a party entitled, the Court has jurisdiction to give redress." This observation probably had reference to the right of a party to matriculate the arms of an ancestor, and not to the privilege of the Lyon summarily to dismiss an application for new arms, on the ground that, in the exercise of his discretion, he did not conceive the applicant to be a "virtuous and well-deserving person." But where nothing to the prejudice of the applicant is brought under the notice of the Lyon, this privilege, though it undoubtedly exists, has become practically obsolete, it being the invariable practice of the Lyon Court to grant arms to all applicants of Scottish descent, on payment of the customary fees.<sup>1</sup>

2117. In deeds of entail the heirs called to the succession are frequently enjoined by the entailer to bear his arms; and it has

<sup>1</sup> The fees on a grant of new arms usually range between L.42 and L.50; those on a matriculation, between L.16 and L.20; the variation being caused by the greater or less amount of historical and genealogical investigation involved.

been held by the Court, that where the maker of the entail has no coat armorial recognised on the books of the Lyon, it is incumbent on the heir succeeding, and on the other heirs of entail, to follow out his appointment by obtaining from the Lyon office arms of the proper description, descendible to the heirs of entail. (Moir, 5th Feb. 1794 ; Mor. 15537.)

2118. In addition to the injunction that the heir shall bear the arms of the entailer, deeds of entail very often contain the further proviso that he shall bear his name, sometimes even his name exclusively. Where a stranger, or a relative through females is called to the succession, the former provision almost always implies the assumption of a new name, and the latter the substitution of one name for another. As much confusion exists regarding the formalities supposed to be necessary for effecting this object, the following statement of the view of the law by which the practice of the Lyon office is regulated may not be unacceptable to the reader.

2119. In the case of Alexander Kettle (Jan. 14, 1835, S. and D. xiii., p. 262), a writer to the signet, who presented a petition to the Court of Session, praying the Court to sanction his assuming the name of Young, the Lord President stated it as his opinion that "there is no need of the authority of this Court to enable a man in Scotland to change his name ;" and the petition, at his Lordship's suggestion, was withdrawn as unnecessary. The decision of the Court had no reference to the fact that Mr Kettle had obtained a royal license to change his name, but proceeded on the general ground, that he was entitled to assume any name he chose. In apparent contradiction to this is the later case of Harry Inglis (Nov. 29, 1837), a writer to the signet, to whom authority was granted to assume the additional name of Maxwell. It is not said that the ground of sustaining the petition was the want of a royal license, which, in the case of Young, was regarded as unnecessary, and there is reason to

think that it passed without reference to Young's case at all. This view is confirmed by the fact, that in a still more recent case (*Kinloch v. Lowrie*, Dec. 13, 1853) the principle of Young's case was followed; it having been held by the Lord Ordinary (Cowan), and acquiesced in, that "a person may sue under a new name assumed by himself, even though assumed without any royal or judicial authority." The only old case of importance is that of Lord Pitsligo in 1749 (M., p. 4155, voce *Falsa demonstratio*), who was attainted by the name of Alexander, Lord Pitsligo. He claimed his estate as not forfeited, he not having been designed by his true name and title. The Court of Session sustained his claim, but the House of Lords reversed the judgment, as it was proved that he was commonly known by the name of Lord Pitsligo. In the Acts of Sederunt many examples will be found of petitions by members of the College of Justice for authority to change their names, and these petitions are generally granted; but all that the Court seems to have done, was to authorize the individuals to practise under the new names which they themselves had already assumed.

2120. In accordance with what thus seems to be the law of Scotland; it is held in the Lyon office that a man may assume any name he chooses. The Lord Lyon, consequently, will not, as is popularly believed, grant authority to an individual to change his name; but on the narrative *that he has already changed it*, he will grant him arms under his new name; and in the patent, or, if desired, in an extract from the record, he will certify the fact of the change. This certificate has been recognised both by the War Office and by the Admiralty, as identifying the bearer of the new name with the bearer of the old name, which is the only object of the Queen's letters patent; and officers in the army and navy have been permitted to change their names on the lists, and to draw their pay under their new denominations.

2121. From a case decided in the Common Pleas (*Davies and Wife v. William Selby Lowndes*, April 27 and 28, 1835, *Bingham's New Cases*, i., p. 597), it would seem that, contrary to the general belief, the law on this subject is the same in England as in Scotland. On the point in question, Chief-Justice Tindal remarked: "There is no necessity for any application for a royal sign-manual to change the name. It is a mode which persons often have recourse to, because it gives a greater sanction to it, and makes it more notorious; but a man may, if he pleases, and it is not for any fraudulent purpose, take a name and work his way in the world with his new name as well as he can. It does not appear to me that that (his not having the sign-manual) is an objection which can, upon the present occasion, succeed." The case was one in which an estate was devised on condition of the devisee's changing his name.

2122. A separate department from the heraldic, and, in the opinion of many, a more useful department of the Lyon office, is that which has reference to Genealogies. In the exercise of his duty in this department, the Lyon receives evidence of the genealogies of all applicants, quite irrespective of any claim which they may have to be descended of noble or honourable lineage, and records it for preservation in a proper register. To what extent the register of genealogies in the Lyon office might be admitted as a probative document conclusive of the facts which it sets forth, has not been ascertained by actual decision; but there can be no doubt that, in questions both as to property and honours, it would be regarded as a most important adminicle of proof. The genealogical department of the Herald's College in London is a very important one, and it is to be regretted that the uses of the corresponding department of the Lyon office are so little understood and appreciated by the public.

## CHAPTER III.

## OF THE ECCLESIASTICAL COURTS.

2123. The ecclesiastical jurisdiction of Scotland was constituted, very nearly as it now exists, by an Act of the 12th Parliament of King James VI., in the year 1592.

2124. Having been thus called into existence as a whole at one particular period of our history, and by a class of persons who attached a peculiar value to logical consistency, it is naturally much more symmetrical than the civil jurisdiction, which has grown up gradually during many centuries.

I.—*Kirk-Session.*

2125. The root from which the whole government of the Presbyterian Church springs is the Kirk Session. It consists of the minister (or in case of a collegiate charge, the ministers) of the parish, and the elders.

2126. The elders are elected by the session ; and their numbers are regulated by the exigencies of the parish.

2127. There *must* be two elders at least in every kirk-session. The minister is Moderator of the session, and if there are two ministers they preside in rotation ; the one who is not presides being a constituent member of the session.

2128. A minister and his ordained assistant cannot both be members of the session.

2129. The duties of the session are to superintend and promote the religious concerns of the parish in regard both to discipline and worship. It is under the former of these heads that the session exercises functions analogous to those of a court of morals. It takes cognisance of scandalous offences, and punishes

them, when proved, by deprivation of religious privileges. The discipline of the Church was formerly of a far more positive kind; but the practice even of public rebuke has now gone entirely into disuse.

2130. The power of disposing of the ordinary church-door collections for the relief of the poor, in so far as formerly vested in the heritors and kirk-session, is transferred to the latter alone in all parishes in which it has been agreed that an assessment shall be levied. (8 and 9 Vict., c. 83, sec. 54; see Dunlop's Poor Law, p. 82.)

2131. The session-clerk is bound, under a penalty, to report annually to the Board of Supervision the application of the collections, and the right of the heritors to examine the accounts of the kirk-session is reserved.

## II.—*The Presbytery.*

2132. The Presbytery is the court immediately superior to the kirk-session.

2133. The bounds of its jurisdiction are fixed by the General Assembly, which has the power of increasing and diminishing the number of Presbyteries. Their present number is eighty-two.

2134. "A Presbytery," says Dr Cook (Styles, Procedure, and Practice of the Church Courts, p. 41), "consists of the ministers of all the parishes within the bounds of the district; of the professors of divinity of any university that may be situated within the bounds, provided they be ministers; and of an elder for each of the kirk-sessions in the district."

2135. "One of the ministers is chosen to act as Moderator, and it is the general practice that the Moderator elected continues in office for six months."

2136. It belongs to the Presbytery to examine candidates for the ministry, and to grant them licenses to preach; to take trial of the qualifications of presentees to parishes, and to ordain them



and induct them, and thereafter to see that the duties of the ministry are properly performed by them in their respective parishes. In the event of any charge involving censure, suspension, or deposition being brought against any ministers within the bounds, it is the duty of the Presbytery to judge in the matter.

2137. The Presbytery further examines all schoolmasters on their appointment by the minister and heritors, superintends their conduct during their tenure of office, tries them when accused, and may depose them should their crime warrant that sentence. It examines annually all the schools within its bounds, and reports on their condition to the General Assembly.

2138. The Presbytery is a court of appeal from the kirk-session; and it is in use to give advice on points referred to it from that body.

2139. The functions of a Presbytery, as a civil court, are confined to judging in the first instance in questions connected with the erection and repair of churches and manses, the excambion of glebes, and the like. Regarding schoolmasters (Dr Hill's *Practice in the Church Courts*, p. 109; see also *ante*, 214, *et seq.*), the judgments of the Presbytery are final, both as to induction and deposition. (43 Geo. III., c. 54, secs. 16 and 21.)

### III.—*The Synod.*

2140. The provincial Synod is superior in powers and in dignity to the Presbytery, and intermediate between it and the General Assembly of the Church.

2141. There are now sixteen Synods in Scotland, that of Shetland having been added to the previous number by an Act of the General Assembly in 1830.

2142. The members of all the Presbyteries within its bounds are members of Synod; with the addition of two corresponding members, a minister and ruling elder from each of the contiguous Synods.

2143. The Synod usually meets twice a year. The Synod of Argyll only once.

2144. The Moderator of the Synod is always a minister.

2145. The Synod acts generally as a court of appeal from the Presbytery; it being incompetent to carry any case directly to the General Assembly, except by special authority from that court, or in the event of no meeting of Synod having intervened.

#### IV.—*The General Assembly.*

2146. The General Assembly is the highest ecclesiastical court in Scotland.

2147. It consists of ministers and elders, who are sent as representatives from all the Presbyteries, royal burghs, and universities. The churches in the East Indies in connection with the Church of Scotland are now also represented.

2148. The number of members sent to the Assembly by each Presbytery is proportioned to the number of ministerial charges which it embraces. Presbyteries containing not more than twelve ministerial charges, which are the smallest, send two ministers and one ruling elder; whilst those having more than fifty-four send ten ministers and five ruling elders. (Fifth Act of Assembly, 1694, and 1712, c. 6.

2149. The office of Principal, where the Principal is a clergyman, or of Professor of Divinity in an university, counts as an additional charge. The town of Edinburgh sends two members, and sixty-five other burghs send one each. Each of the five universities sends one, and the churches in India two. Additional members are occasionally added to the Assembly in consequence of the increase made to the numbers of the members of Presbyteries by the erection of new churches.

2150. The Assembly meets in Edinburgh annually on the first Thursday after the 15th of May.

2151. The Commissioner, who is appointed to represent the

Crown in the Assembly, takes no share in the debates; and it has been even maintained that the Assembly may proceed to business without him. Great care, however, is now taken to prevent collision between the powers of the Assembly and the Crown. Though the Commissioner be absent, the Assembly does not resolve itself into a committee or report its proceedings on his return. Nor does he assert any right to be made acquainted with its proceedings.

2152. When the Moderator appoints the next Assembly to meet on a particular day of the following year, "in the name of the Lord Jesus Christ, the King and Head of the Church," the Commissioner invariably appoints the same day "in the Queen's name."

2153. The first act of the Assembly is to choose a Moderator, who is always one of the ministers on the roll of members of that Assembly. He is usually proposed by the preceding Moderator; it being competent, however, for any member to propose another candidate. The General Assembly has also a procurator, or assessor, who is always a member of the bar, and an agent who is a Writer to the Signet,—principal and depute-clerks, printers, and other officials.

2154. The General Assembly acts both in a legislative and a judicial capacity. Legislative measures are introduced in the form of *overtures* (*ante*, p. 2); *i.e.*, proposals or suggestions, which may originate with a member of Assembly, a Presbytery, a Synod, or with a committee appointed by the Assembly itself for the purpose. When an overture has been adopted by the General Assembly, it is transmitted to the several Presbyteries, with injunctions to report on it to the next General Assembly. "If the more general opinion of the Church agree thereto" (Barrier Act, Jan. 8, 1697, Act. ix.; Cook's Practice, 266–7), that is to say, a majority (or forty-two), Presbyteries have reported in its favour, it may then pass into a law. In cases

requiring greater despatch, the Assembly is in use to pass interim acts, which are binding till the meeting of the next Assembly, and may be continued till the overture either passes into a law or is finally rejected.

2155. Private questions are brought before the Assembly as a court of law by *petition*; and it is usual for the party to be represented by counsel, who also appear not unfrequently in the inferior ecclesiastical courts, except the kirk-session, before which law-agents are not allowed to practise.

2156. The annual session of the General Assembly is ten days, and such business as it is unable to overtake during this time is referred to the "*the Commission*."

2157. *The Commission* consists of all the members, with the addition of one minister named by the Moderator. Thirty-one members make a quorum, provided that twenty-one of these are ministers.

2158. The stated meetings of the Commission take place on the day after the dissolution of the Assembly, on the second Wednesday of August, the third Wednesday of November, and the first Wednesday of March; but it is competent for the Moderator to call a special meeting of the Commission on any emergency.

2159. The proceedings of the General Assembly are generally liable to review in the civil court when they affect either the patrimonial interest or other civil rights of individuals, and in all cases in which they exceed the power conferred upon them by statute or common law.

2160. The various bodies of Dissenters from the Presbyterian Church of Scotland are governed by organizations distinct from, but analogous to, that of the Established Church.

## CHAPTER IV.

## OF THE PRACTITIONERS OF THE LAW.

2161. In Scotland, as elsewhere, the practitioners of the law are divided into various classes, who perform functions essentially different.

2162. (1.) *Advocates*.—This is the name by which members of the bar are known in Scotland, as in France. Their position with reference to the other branches of the profession is the same as that of barristers in England.

2163. They possess the exclusive privilege of pleading in the Supreme Courts, and are entitled to plead in all the other Courts, civil, criminal, and ecclesiastical, including the House of Lords in Scotch appeals and the colonial courts. The Supreme Judges and principal Sheriffs always, and the Sheriff-substitutes generally, are selected from the bar.

2164. The origin of the profession in Scotland is probably of very early date. In 1424 (1424, c. 24) provision is made for securing the assistance of its members to pauper litigants. But the existence of the Faculty or Society of Advocates is coeval with the institution of the College of Justice in 1532.

2165. The number of members of this body, which at first was limited to ten, has long been unlimited. At present it consists of about 432 members, not one-fourth of whom are engaged in practice.

2166. The Faculty is presided over by a Dean, elected by its members, who is usually the most prominent practitioner for the time being; and by him, assisted by a council, its affairs are managed.

2167. Admission to the body is preceded by two examina-

tions—the first being in general scholarship, the second in Law.

2168. The degree of Master of Arts of any British university, or such degree of a foreign university as, in the opinion of the Dean and his council, affords evidence of the same amount of scholarship as that afforded by the degree of Master of Arts of a Scottish university, is accepted as an equivalent for the first examination. It is now the almost invariable practice for candidates to produce a diploma in Arts.

2169. A year must elapse between the first examination, or the presentation of the diploma as its substitute, and the second examination in the Civil Law of Rome and the Municipal Law of Scotland; and this examination must be preceded by attendance on the Law classes in the University of Edinburgh.

2170. Both examinations are conducted by persons of learning, usually professors in the University of Edinburgh, who act as assessors to a Committee of Faculty appointed by the Dean.

2171. The fees of admission to the Faculty are about L.336.

2172. The Library of the Faculty of Advocates, which was founded by Sir George Mackenzie in 1682, is the most extensive and valuable in Scotland. It consists of about 160,000 volumes, and is particularly rich in MSS. relating to the history of Scotland. It has been already mentioned, under the head of Copyright (*ante*, p. 320), that the Advocates' Library is entitled to a copy of every work entered at Stationers' Hall.

2173. (2.) *Writers, or Clerks to the Signet*, are the highest class of law agents.

2174. Their functions in litigation are those of attorneys and solicitors in England, and they also act very extensively as conveyancers and managers of private affairs. When viewed in the latter capacity, they are usually spoken of as agents, commissioners, or factors for the parties.

2175. Writers to the Signet are resident in Edinburgh, and

practise, as such, exclusively before the Supreme Courts ; but the individual members of the body possess also the privilege of practising before the Sheriff Court in all matters that have been transferred by statute from the Supreme Courts to the Sheriff Courts, as proceedings in bankruptcy, etc.

2176. The name is said to have originated in the first members of the body having been clerks in the office of the Secretary of State, by whom writs passing the King's signet were prepared ; and they still possess the exclusive privilege of preparing the warrants of charters of land flowing from the Crown, of signing summonses citing parties to appear in the Court of Session, and all other writs that pass the signet, as diligences for affecting the person or estate of the debtor, or for compelling implement of the decrees of the Supreme Court.

2177. The Society is presided over by a Keeper, who usually acts by deputy, and by whom, assisted by certain commissioners named by the Keeper, its affairs are managed.

2178. Admission must be preceded, 1st, by attendance during two different sessions, or two full winter courses of lectures, in the Faculty of Arts of a Scottish university. One certificate must be produced from a professor of Latin, or Humanity, as it is called.

2179. 2d. By an apprenticeship, which must not be entered on under sixteen years of age, and is of five years' duration.

2180. 3d. Attendance on four courses of lectures on Law in the University.

2181. The candidate is also subjected to two examinations, one in scholarship and one in Law, previous to admission.

2182. The apprentice-fee to the master is L.200. The payment by the apprentice to the widows' fund is L.50, 1s. 6d. ; to the general fund of the Society, L.81, 2s. 6d. ;—the total indenture fees being L.331, 4s. At passing, there is a further fee of L.25 for the commission ; a passing fee of L.51, 6s. ; and L.3, 5s. 6d. of perquisites to officers ;—the total expenses of

entering the body being L.410, 15s. 6d. The writers to the signet possess a large and valuable library.

2183. (3.) *Solicitors before the Supreme Courts* are also a corporate body of some antiquity, the members of which, as regards litigation, discharge most of the functions entrusted to writers to the signet, with the exception of signing summonses citing parties to appear in the Court of Session, and other writs passing the signet with a view to securing the debtor's funds.

2184. The apprenticeship of a solicitor is five years; and attendance at the University, though to a more limited extent than in the case of a writer to the signet, is also requisite.

2185. The fees of admission to the body are much more moderate,—the whole amounting to about L.155.

2186. *College of Justice*.—All advocates, writers to the signet, and solicitors (*Bruce v. Clyne*, Jan. 24, 1833) before the Supreme Courts, are members of the College of Justice.

2187. (4.) *Solicitors-at-law* are a society of agents resident in Edinburgh, and incorporated by Royal Charter.

2188. Their practice is confined to the Sheriff and other inferior courts in Edinburgh, in which, except under the bankrupt statutes, members of the two last-mentioned bodies do not practise.

2189. (5.) *Provincial Writers*.—Writers, in provincial towns, act not only as procurators before the Sheriff Court, but generally as agents and factors in the conduct of private affairs, in the same manner as the above-mentioned practitioners in Edinburgh. In Glasgow the procurators are a numerous and important chartered body. In Aberdeen alone, the writers are called advocates, in virtue of a charter.

2190. In cases arising in the provinces, even though likely, from their nature, to terminate in the Court of Session, or to lead to a jury trial in Edinburgh, it is usual to employ a country agent in the first instance.

2191. (6.) *Notaries*.—Many of the writers to the signet, and



other practitioners, are also *notaries public*, in which character they protest bills, and prepare notarial instruments of various kinds; the most important and frequent of which has been nearly superseded by a recent Act (21 and 22 Vict., c. 76), substituting registration of conveyances for instruments of seisin. They also authenticate deeds for those who cannot write.

2192. Notaries are admitted by the Court of Session, after examination by members of the Society of Writers to the Signet.

2193. *Agent and Client*.—No action of damages for negligence or want of skill can be maintained either against a barrister in England, or an advocate in Scotland; and, on the other hand, no action is competent to them for payment of their fees, which, in practice, are consequently always paid in advance; but such is not the case with an attorney or agent. Questions of much nicety have arisen, and must continue to arise, as to the extent of responsibility which agents incur in the special circumstances of the cases with which they are entrusted. All that can be here attempted, is to point out the general rules by which their responsibilities are governed. Like all other professional persons, law agents are presumed to possess such industry and knowledge of their craft as to enable them to practise it with safety to their employer in ordinary circumstances, and they will therefore be responsible for the consequences of extreme negligence or gross professional ignorance. Their ill success, however, will not support a presumption of want of skill, even though the agent should have predicted a result from his exertions altogether different from that which has occurred. In a leading case in the House of Lords on this subject (*Purves v. Landell*, March 10, 1845, 4 Bell 46), in which the judgment of the Second Division of the Court of Session, led by the late Lord Justice-Clerk Hope, was reversed, and the interlocutor of Lord Cockburn affirmed, it was held that, “to make a solicitor liable for the consequences of acts done by him in his professional

capacity, either in damages or in relief of monies paid by the client, the summons must expressly aver want of reasonable skill or gross negligence, or show facts necessarily raising an inference of one or other." In delivering the judgment of the House, Lord Brougham said, "I cannot go into the alarming doctrine laid down by the Lord Justice-Clerk, which I hold to be quite erroneous, and which, I think, is not accurately reported. It is said, it is unnecessary to allege that Mr Purves (the agent) was guilty either of want of skill or of negligence. It is enough to allege that what he had done was a nullity. Now, the mere allegation and proof of such a fact as that could never be sufficient; because, unless a great deal more is proved, you may just as well say that every non-suit, or every action that failed, or every case in which what was called an unfructuous proceeding has taken place, even though the attorney should really be successful in the case, yet if, notwithstanding that, there should not be a beneficial result from the action, that would make the attorney liable. No man can possibly conceive that such is the liability of an attorney. There must be considerable mismanagement, considerable ignorance, and the absence of attentive conduct in general. Unless it is gross, the law holds that it is sufficient." In the same case, Lord Campbell remarked, that "the law must be the same in all countries, where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice."

2194. In addition, a direct claim against the client for payment of the expenses which he has incurred, and for his own account, a law agent has a preference, of the nature of an hypothec or lien, over such expenses as may be awarded by the Court against the opposite party in a suit; and he has also a right to retain the papers and title-deeds of his client, which have come into his custody in a legitimate manner, until his professional accounts are paid.

2195. A mandate to appear judicially, in name of a party to a suit, is presumed with respect to a procurator in an inferior court, from his being possessed of that party's writings; and as to an advocate in all the courts, such a mandate belongs to the privilege of his gown.

## CHAPTER V.

### PRACTICAL SUGGESTIONS WITH REFERENCE TO JUDICIAL PROCEEDINGS.

2196. Were we to attempt to place before our readers anything approaching to an intelligible account of the forms of procedure either in civil or criminal actions, we should not only exceed the limits, but violate the objects, of the present work. These, together with the preliminary diligences which the law has furnished for the protection of property in dispute, are pre-eminently professional subjects; and it is very far from our intention to induce non-professional persons to occupy themselves with such, beyond the extent which may be necessary for their practical guidance. As regards the conduct of litigation, no such necessity can arise. In the ordinary intercourse of life, any man may be compelled, at any moment, to determine whether or not he shall adopt a course of conduct which may afterwards compel him to become a litigant, but he never can be forced to engage in judicial proceedings with such precipitation, or to conduct them in such isolation as to deprive him of professional aid; and the soundest advice that can be given him, when about to litigate, is to place himself in the hands of a respectable agent with the smallest possible delay.

2197. All that shall be attempted in the present section, therefore, will be to furnish such information as will enable persons

unacquainted with the institutions and professional arrangements of the law of Scotland,—strangers, foreigners, females, and the like,—at once to adopt such measures as will procure them redress of injuries, or enable them to resist aggression.

2198. *Civil Actions*.—(1.) *Small Debt*.—The only court in which parties usually appear on their own behalf is, as we formerly explained, the Small Debt Court.

2199. The first step to be adopted in raising an action before a Small Debt Court, is to make application to the clerk of Court (who will usually be found, during business hours, at the County Buildings, both in Edinburgh and in provincial towns) for a printed copy of the form of summons or writ by which the defender is called into Court, which is appended to the statute by which these courts are regulated. (1 Vict., c. 41.)

2200. This document, being filled up by the complainer with a statement of “the origin of his debt or ground of action, and, whenever possible, with the date of the cause of action, or last date in the account” (Schedule A.), and signed by the Sheriff-clerk, is a sufficient warrant to a Sheriff’s officer for summoning the defender to appear and answer at the time and place mentioned in the summons and complaint, which must not be sooner than the sixth day after citation.

2201. This writ, and the copy of it served on the defender, is further a sufficient warrant for summoning such witnesses, or the possessors of such documents or other means of proof, as either party may require. (Sec. 3.)

2202. If any witness, or other person thus required for the conduct of the action, who has been cited forty-eight hours before the time of appearance, shall fail to appear, he is liable to the party citing him in a penalty not exceeding forty shillings, unless a reasonable excuse be offered and sustained by the Sheriff.

2203. Though the statutory duties of the clerk of Court are fulfilled when he has furnished the pursuer with the means of

raising his action, and enabled both parties to compel the attendance of such witnesses as they may require, he is generally willing to give to either of them whatever further advice or assistance may be requisite.

2204. It is of great importance that both pursuers and defenders in the Small Debt Court should have their witnesses present at the first calling of the cause. It is no doubt in the judge's power to continue or postpone the case, either till the other cases are disposed of, or to a subsequent court-day; but despatch being one of the primary objects of the small debt jurisdiction, he will not generally do so unless a very sufficient reason is stated to him.

2205. The admission of agents is also at the discretion of the judge; but it may be stated, as an almost invariable rule of practice, that their interposition will not be excluded wherever either the circumstances of the party or character of the case render it desirable for the attainment of substantial justice.

2206. (2.) *Ordinary Actions*.—It is one of the constitutional privileges of every British subject to sue and defend in his own person in every court, whether inferior or superior, which has jurisdiction over him. But the privilege is one so rarely exercised, and the exercise of which is so little expedient, that we cannot regard it as desirable that we should furnish rules for the guidance of the few who may desire to assert it. He who determines to act as his own lawyer must be prepared to encounter the professional skill from which, in an ordinary action, his opponent will not be shut out; and, in order to do so with success, he must arm himself with professional weapons. To such an one, as to all the world, the literature of the profession is open; and if he is resolved to cope with those who have received a professional training, he must not stop short with the perusal of elementary works and popular treatises.

2207. *Litigation by the Poor*.—In 1424, a statute (1424, c.

45) was passed by the Parliament of Scotland for securing the gratuitous assistance of advocates to the poor (*ante*, see 2164); and the privilege thus early conferred on them they have ever since retained. The Court of Session, by Acts of Sederunt passed from time to time, have determined the conditions on which admission to the benefits of the poor's roll should be granted, both in the superior and the inferior courts. Under the existing Act (A. S., 21st Dec. 1842) it is requisite to admission in the Court of Session that each litigant shall procure, 1st, a certificate from the minister and two elders of the parish in which he resided, setting forth his circumstances in conformity with a schedule furnished in the Act; and, 2d, a report from a board of lawyers, consisting of two advocates, one writer to the signet, and one solicitor, who are appointed annually by their respective bodies, to the effect that he has a "probable cause," that is to say, that his claim is not obviously unfounded. Similar regulations exist in the Sheriff Courts (A. S., 11th July 1839). By the adoption of these rules the privilege conferred upon persons in indigent circumstances has been prevented from being, as it was formerly, a hardship to their opponents, and a means of gratifying their own spiteful or vindictive feelings. An exception to the regulations above-mentioned has been introduced by the Poor Law Act of 1845 (8 and 9 Vict., c. 83, sec. 74), in the case of a poor person who shall consider the relief granted him to be inadequate, and who shall procure from the Board of Supervision a minute declaring that, in their opinion, he has a just cause of action. The production of this minute at once entitles him to the benefit of the poor's roll in the Court of Session.

2208. *Criminal Actions*.—The excellent institution of public prosecutors (*ante*, pp. 365, 369), both in the superior and inferior criminal courts of Scotland, relieves private parties in all cases from the necessity of seeking redress for injuries of a criminal nature by their own means.

2209. When an offence is committed, all that is requisite is, that the Procurator-Fiscal (*ante*, p. 369) be made acquainted with the whole circumstances attending it with the smallest possible delay, either through the interposition of the police, or directly. A warrant for the apprehension, examination, and, if necessary, the incarceration of the suspected offender, will then be procured from a magistrate on his application; and all other necessary steps will be taken by his instructions for prosecuting the offence either in the inferior or superior courts, according to its nature or the previous character of the offender.





# INDEX.

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*The Numbers refer to the Paragraphs.*

---

- A me vel de me holding, 1188.  
Abandonment in marine insurance, 1763.  
Aberdeen Act, 851.—*See* Entail.  
Able-bodied poor, 1912.  
Acceptance of bill, 1529 ; must be in writing, *ib.* ; conditional, 1533 ; for honour, 1536 ; presentment for, 1559.—*See* Bill.  
Acceptance of an offer may constitute a lease, 1313.—*See* Letting and Hiring.  
Accession, 761–770.—*See* Succession.  
Accommodation bills, 1555.  
Accounts, shop, prescription on, 1298 ; current, *ib.*, 1300.—*See* Prescription.  
Accountant in bankruptcy, 1474, 1500.  
Accounting, rules of, in partnership, 1620.  
Actions, civil, in Small Debt Courts, 2198 ; ordinary civil actions, 2206 ; criminal actions, 2208.  
Acts of Parliament, 4.  
Acts of Sederunt, 8.  
Adherence, action of, now unnecessary, 227.  
Adjudication on trust bond, 947 ; action of, against apparent heir, 1197.  
Administration, right of, 122.  
Admiralty, Court of, 2003.  
Admiral, Lord High, 2003.  
Adultery, 205.  
Adventure, joint, 1628.—*See* Partnership.  
Advocates, name derived from France, 2162 ; called barristers in England, *ib.* ; can plead in all courts, 2163 ; judges chosen from, *ib.* ; history of profession, 2164 ; numbers, 2165 ; Faculty of, is presided over by a Dean, 2166 ; rules as to admission to body, 2167 ; fees of admission, 2171 ; library of Faculty, 2172.  
Advocates, depute, prosecute in Court of Justiciary, 2024.  
Advocate, Lord, prosecutes in Court of Justiciary, 2024.  
Advocation, value of action must be L.25 to be competent, 1959 ; caution in, 1731.  
Affidavits before justices, 2090.  
Affinity, within what degrees an impediment to marriage, 40.  
Affreightment, 1395.  
Age, to what, pupillarity extends to, 329 ; minority, *ib.* ; majority, *ib.*—*See* Guardianship.  
Aged persons, when entitled to relief under Poor Law Act, 1903.  
Agent, bank, caution for, 1726.  
Agent for church, 2153.  
Agent and client, 2193 ; no action of damages competent against a bar-

- rister or advocate, *ib.*; general rules by which responsibilities of agents are governed, *ib.*; law agent's hypothec, 2194; a mandate is presumed by an agent being possessed of party's writings, 2195.  
 Agent and principal.—*See* Principal and Agent.  
 Agents, law, in Edinburgh, 2173 *et seq.*; in provincial towns, 2189.  
 Agnate, nearest male, is tutor-at-law, 353.  
 Agreement, 1308.  
 Agricultural lease, 1309.—*See* Letting and Hiring.  
 Alienation, prohibition against, 846. *See* Entail.  
 Aliment of wives, 96 *et seq.*; of relations, 290 *et seq.*, 1914 *et seq.*; of bastards, 309 *et seq.*  
 Aliment of paupers, 1903 *et seq.*, 1914 *et seq.*  
 Aliment allowed to officers and clergymen under decree of cessio, 1502.—*See* Bankruptcy and Insolvency.  
 Altius non tollendi, servitude of, 1258.  
 Ann or annat, 1262.  
 Annus deliberandi, 818.  
 Anonymous partnership, 1587.  
 Apparent heir, 813; action of adjudication against, 1197.  
 Appeal to House of Lords, 2013 *et seq.*; to Circuit Courts, 2037 and 2063.  
 Application of pauper for relief, 1899.  
 Apprentice, master and, 720 *et seq.* —*See* Master and Servant.  
 Aqueduct, servitude of, 1251.  
 Arbitration between master and workmen, statute law relating to, 701 *et seq.*  
 Arrears of rent, prescription of, 1296.  
 Arrears of aliment do not prescribe, 313.  
 Arrestment of wages, 665.  
 Arrestments prescribe in three years, 1305.  
 Arrest, protection from, under sequestration, 1449 — *see* Bankruptcy and Insolvency; by princes, 1765 — *see* Insurance.  
 Arms, Lord Lyon has jurisdiction with reference to, 2111.  
 Arms, messenger at, 2111.  
 Articles of roup, 1200.  
 Assembly, General, 2146. — *See* Courts, Ecclesiastical.  
 Assessment for support of poor first imposed after accession of James VI., 1883; not actually enforced for more than a century after, *ib.*; how levied under existing law, 1937.  
 Assignment of servant by master, 676; of apprentice, 738.  
 Assignment, in what cases necessary, 1538.  
 Assignment, cautioner on paying debt entitled to, of same, 1696.  
 Assignment of lease, when power implied, 1345 *et seq.*; always implied in urban leases, 1372.—*See* Letting and Hiring.  
 Assimilation between Scotch and English law, 3.  
 Associations, Guarantee, 1638–1723.  
 Attendance, medical, on servant, 639; on pauper, 1902; a privileged debt, 1012.  
 Attorney, power of, 1523.  
 Attorneys, 2174.—*See* Writers to the Signet.  
 Auction or roup, sale by, 1199.—*See* Sale.  
 Augmentations of stipend, 1997.—*See* Teind Court.  
 Authentication, bills and promissory notes exempted from, 1506.  
 Average in marine insurance, 1764.  
 Back bond, absolute disposition with, 1871.  
 Banks, chartered, 1638; joint stock, 1634.  
 Bank notes, 1541.  
 Bank agent, caution for, 1726.  
 Bank, cautioners for a cash credit account with, 1709.

*Bankruptcy and insolvency*, 1443; objects of bankrupt law, 1443; how attained, 1444; provisions of Bankrupt Act, 1445 *et seq.*; sequestration at common law, 1446; statutory sequestration, 1447; effects of, 1448; what concurrence requisite, 1449; protection from arrest, *ib.*; sequestration not now confined to persons engaged in trade, 1451; judicial factor, when appointed, 1452; interim factor, *ib.*; books, etc., may be sealed by Sheriff, 1453; sequestration now awarded by Sheriff, 1454; how opposed, 1455; how recalled, 1456; regular course of procedure in, 1457; trustee in, *ib.*; who may be, 1458; procedure at election of, 1459-64; objections, how disposed of, 1465; security by trustee, 1468-70; *commissioners* elected at same meeting as trustee, 1471; their duties, 1472; *removal* of trustee and *commissioners*, 1473; accountant in bankruptcy, his duties, 1474; resignation of trustee, 1477; trustee's inventory, 1478; bankrupt must afford every information, 1479; *examination* of bankrupt, 1480; of conjunct and confident persons, 1482; wife may be examined, 1483; *discharge* of bankrupt on composition, 1484; *discharge* of bankrupt without composition, 1485; *notour* bankruptcy, 1486; how constituted under recent Act, 1487; how further constituted, 1490; how constituted in case of a company, 1491; *ranking*, 1493; *cessio bonorum*, 1494; jurisdiction in, extended to Sheriffs, 1495; provisions of statute relating to, 1496-9; trustees in cessios now under accountant of bankruptcy, 1500; decree of *cessio* does not confer power to claim discharge, 1501; working tools may be retained, 1502; a mere aliment allowed to half-pay officers and clergymen,

*ib.*; in what case creditors may resolve that bankrupt shall only obtain decree of *cessio*, 1503.

Banns, publication of, 25.—*See* Marriage.

Bastards, how legitimated, 272; aliment of, 309, 1923; custody of, 317.

Bequest, power of person to make, only extends over a third when there are wife and children, 972.—*See* Succession.

*Bills of exchange, inland bills, and promissory notes*, their objects, 1504; exempted from formal authentication, 1506; possess additional privileges for transmission and execution, 1507; bill of exchange, its form, 1509; form of foreign bill, 1511; to what amount bills may be granted, 1512; inland bill, 1513; its form, 1514; date of presentment must be marked when bill payable after sight, 1516; promissory note, form of, 1517; *requisites* of bills and notes, 1519; obligation must be absolute, 1520; must be for money, 1521; clause of interest does not vitiate bill, *ib.*; date, 1522; provisions of Mercantile Law Amendment Act as to proving, *ib.*; subscription, 1523; by procuration, *ib.*; by initials or mark, 1524; when blank left or sum altered, how far good in hands of a third party, 1525; minors, bills and notes by, 1526; married women cannot grant, 1527; *recourse*, 1528; *acceptance* must now be in writing, 1529; refusal to accept, its effect, 1530; acceptance by procuration, 1531; acceptance by a partner, 1532; conditional acceptance, 1533; may be for part of sum, 1534; 'as executor,' or 'cautioner,' 1535; acceptance and payment for honour, 1536; *indorsement*, 1538; full and blank indorsement, *ib.*; may be either before or after term of

payment, 1540; *bank notes*, 1541; notes of Bank of England must be accepted, 1542; *bank cheques*, 1544; cross cheques, 1545; provision of 19 and 20 Vict., c. 25, as to, *ib.*; and of 21 and 22 Vict., c. 79, 1546; stamp duties on cheques, 1547; alterations and erasures, effect of, on bills, 1548-9; how debt may be proved when bill set aside, 1550; *stamp*, bills and promissory notes must have, 1551; amount of duty, 1552-3; regulations as to stamping foreign bills, 1554; *accommodation bills*, 1555; understanding on which granted, 1556; parties liable to bill-holder as their signatures appear on bill, 1557; *presentment for acceptance*, 1559; when bill must be presented where payable on a certain day, 1560; where payable at a period after sight, 1561; presentment must be made within business hours, 1562; *presentment for payment*, 1563; *days of grace*, 1564; bills payable on demand have no days of grace, 1565; not settled, if allowed on a bill at sight, 1566; what sufficient presentment, 1567; *protest*, 1568; how performed, *ib.*; noting, *ib.*; at whose instance may be made, 1569; provisions of 19 and 20 Vict., c. 60, as to protesting bills, 1570; notice indispensable to preserve recourse, 1571; no form requisite, 1572; notice must identify bill, and inform party of protest, 1573; sufficient if put into post-office, *ib.*; verbal notice sufficient, *ib.*; notice in foreign bills, 1574; in inland bills and notes, 1575; by whom and to whom notice must be given, 1576; bill-holder may select any indorser, 1577; how subsequent indorsers may become free, 1578; provision of 19 and 20 Vict., c. 60, as to bills lost, stolen, or fraudulently obtained, 1579; *diligence*, execution may proceed on bills

and notes without action, 1580; registration equivalent to decree, *ib.*; *prescription*, 1581; bills and notes prescribe within six years, *ib.*; bank notes are exempted, 1582; not interrupted by markings of interest or partial payments, 1583. Bills of lading, 1407; pass by indorsation, 1538.—*See Letting and Hiring.*

Bill Chamber, 1954.

Blench holding, 1173.

Blind persons cannot be witnesses to a deed, 979.

Blood, full and half, 41.

Board of Trade may appoint registrars of banking companies, 1648.

Bond, personal, 1858; bond, heritable, 1867; bond and disposition in security, 1870; absolute disposition, with back bond, 1871; bond of presentation, 1730.

Bonded warehouses, 1430 *et seq.*

Bonorum, cessio, 1494.—*See Bankruptcy.*

Book, 1801.—*See Copyright.*

Brieve of service, 930.—*See Succession.*

Broker, 1739.—*See Insurance.*

Bubble Act, 1631.

Burdens and rights attaching to heritable property, 1208 *et seq.*—*See Property.*

Burdens, public, 1208 *et seq.*

Burgage, property held, powers of magistrates with reference to, 2070; entry to, 948.

Burgh Courts, 2070.

Calumny, oath of, its terms, 215. Carriers are middlemen, 1145; their special liabilities, 1412 *et seq.*

Cash credit, 1709.

Casualties of superiority, 1176.

Cattle, servitude of watering, 1253; servitude of pasturing, 1245; landlord's hypothec over, 1365 and 1367.

Cautionary obligations, 1684; proper and improper, distinction between, abolished by Mercantile Law

Amendment Act, 1685; cautionary generally gratuitous, 1686; sometimes for premium paid, *ib.*; Scotch law adopted in England, 1687; guarantee associations, 1688; cautionary obligations must be in writing, 1690; may be dependent on a condition, 1691; cautioner entitled to plead every defence competent to principal debtor, 1692; *discussion*, 1693; what it imports, 1694; abolished by Mercantile Law Amendment Act, unless stipulated for, 1695; cautioner entitled to assignation of debt and diligence, 1696; may take legal measures for his relief, 1697; has a lien over any debt he owes to principal debtor, 1698; co-cautioners, 1699; a co-cautioner seeking relief against the others must communicate any deduction he has received, 1700; *division*, 1701; discharge of principal debtor is a discharge of cautioners, 1702; neglect by the creditor of proper measures is a defence to cautioner, 1703; cautioner not freed by creditor merely forbearing to enforce payment, 1705; but is so if creditor agrees to give time, *ib.*; *prescription*, 1706; requisites in order to have benefit of Act, *ib.*; cases to which Act does not apply, 1708; *cautioners for a cash credit*, 1709; on payment by cautioners, bank must assign securities held by them, 1715; termination of the obligation, 1716; cautioners for agents, 1717; nature and extent of liability must be disclosed to cautioner, 1718; presumption is that it is merely prospective, 1719; creditor is bound to exercise a certain vigilance, 1720; not at liberty to sanction any departure from terms of contract, *ib.*; mere neglect, unless very gross, will not relieve cautioner, 1721; cautioners for Government servants,

1723; for messengers-at-arms, 1724; for bank agent, 1726; judicial caution, 1727; *judicio sisti*, 1728; *judicatum solvi*, 1730; caution in a suspension or advocacy, 1731; juratory caution, 1734; caution *judicatum solvi* in maritime actions abolished, 1736.

Certificate of registration of ship, 1157.

Cessio bonorum, 1494.—*See* Bankruptcy and Insolvency.

Chancellor of Scotland, office of, abolished, 1948.

Character of servant, master not bound to grant, 672.

Chartered banks, 1637.

Charter party, 1394.

Cheque, bank, 1544.

Child, 263 *et seq.*—*See* Parent and Child.

Choosing of curators, 428.—*See* Guardianship.

Churches, 1264; rebuilding of, 1265.

Church courts, 2123.—*See* Courts, Ecclesiastical.

Circuit Courts, 2033.

Civil law, its influence on the law of Scotland traceable to the French connection, 3; its effects on the law of marriage, guardianship, and contracts, *ib.*

Clandestine marriages, 30.

Clare constat, entry of heir by writ of, 943.

Clergy of Established Church, how supported, 1260.

Clerks, hiring of, 554.

Code de commerce, 1631, note.

Co-cautioners, 1699.

Cognates, 375.—*See* Guardianship.

Cognition of insane or facile person, 493 *et seq.*—*See* Guardianship.

Cohabitation, marriage by, 33.

Collateral kindred, 785.

Collation, 1002.

Collections at church doors, 1933.

College of Justice, founded on the model of the Parliament of Paris, 3; its present members, 1967.

Combinations among workmen, 706.

- Commercial Bank, 1638.  
 Commercial law, 1050 *et seq.*  
 Commissary Court, 2008.  
 Commission of the Peace, 2078.  
 Commission of Assembly, 2156.  
 Commissioner Royal to General Assembly, 2151.  
 Commissioners in sequestration, 1471.  
 Common, rights of pasturage over, 1246.  
 Communication of easements among co-cautioners, 1700.  
 Community of goods, 105.—*See* Marriage.  
 Company, 1584.—*See* Partnership.  
 Composition to superior, 1176.  
 Composition by bankrupt, 1484–5.  
 Concubinage, how converted into marriage, 34.—*See* Marriage.  
 Conditional legacy, 996, *ib.*; acceptance of bills, 1533.  
 Confirmation, writ of, substituted for charter of, 1188.  
 Confirmation of executor, 1005.  
 Conjunct and confident persons, 1482.  
 Conjunct rights, 839.  
 Conquest, 808.—*See* Succession.  
 Consanguinity, 782.  
 Consent, legal, requisites of, 14.  
 Consistorial actions, 245.  
 Contracts, constitution of, in general, 1053; consent must be deliberate and voluntary, 1054; error in essentials, 1055; force and fear, 1056; fraud, 1057; all contracts valid until reduced, 1058; written contracts, 1059; locus penitentiæ, 1061; how excluded, 1062; rei interventus, 1063; homologation, 1064; immoral contracts, 1065; gaming debts and wagers, 1066; contracts made on Sunday, 1067; Tippling Act, 1068; to what this Act applies, 1069.  
 Contracts of letting and hiring, 1306.—*See* Letting and Hiring.  
 Contract of sale, 1070.—*See* Sale.  
 Contracts, marriage, 248 *et seq.*  
 Conveyance of land, 1164.—*See* Sale of Heritage.  
 Conveyancers, 2173.—*See* Writers to the Signet.  
 Copyright, history of, 1797–9; now regulated by 5 and 6 Vict., c. 45, 1800; what is a book? 1801; does not include designs which are protected by separate Acts, *ib.*; endurance of copyright, 1802; must be for forty-two years, 1803; may be longer, *ib.*; applies to copyrights under former law, if held by author or his representatives, 1804; Privy Council may license publication of book when author dead, 1805; copies of books must be delivered at British Museum, and given to Bodleian Library at Oxford, public library at Cambridge, Library of Faculty of Advocates, Edinburgh, and Library of Trinity College, Dublin, 1806; register at Stationers' Hall, 1808; damages for printing book in which copyright subsists, 1810; summary mode of conviction, 1811; reviews, magazines, etc., 1814; musical and dramatic works, 1815; engravings, maps, etc., 1816; sculpture, 1817; universities, 1818; lectures, 1819; letters, 1820; newspapers, 1821; international copyright, 1822–8; copyright in designs, 1829.  
 Courtesy, 180.—*See* Marriage.  
 Courts, 1945 *et seq.*; supreme, and judges, *ib.*; inferior, 2039; ecclesiastical, 2123.  
 Court of Session, 1945; when instituted, *ib.*; its original constitution, 1946; churchmen appointed to be judges, *ib.*; office of Lord Chancellor abolished at Union, 1948; peers appointed to sit with judges, *ib.*; Court of Session one tribunal till 1808, 1949; now divided into two courts, Outer and Inner House, *ib.*; subsequent changes in number of judges, 1950; now consists of thirteen, 1951; arrangements as to busi-

*Courts—continued.*

ness, 1953; judges hold office *ad vitam aut culpam*, 1958; appointed by Crown, *ib.*; *Acts of Sederunt*, powers of court to pass, 8; *Bill Chamber*, 1954; *Jurisdiction of Court of Session*, 1959; to what amount debt must be, *ib.*; review by Court of Session, 1960; review by House of Lords, 1962; questions of fact, 1965—*see* Jury Court; law and equity not separated in Scotland, 1966; *College of Justice*, 1967.

*Departments of Court of Session*, 1969.

*Jury Court*, 1969; institution of, *ib.*; object of, 1971; its first constitution borrowed from England, 1972; first statute introducing it only had force for seven years, 1973; permanently established in 1819, 1974; incorporated with Court of Session in 1830, 1976; before whom jury trials may take place, 1977; what cases may be sent to, 1978; changes in arrangement of procedure for jury trials introduced by 13 and 14 Vict., c. 36, 1979; *verdict*, 1983; confinement of jury now reduced to three hours, *ib.*

*Court of Exchequer*, 1984; jurisdiction of, transferred to Court of Session in 1856, 1985; history of ancient Court of Exchequer, 1987; subsequent changes in duties of, 1993 *et seq.*; present arrangement introduced by Exchequer Act, 1995.

*Teind Court*, 1996; its history and present jurisdiction, *ib. et seq.*

*Admiralty Court* of, 2003; its history, *ib.*; abolished in 1830, 2005; present arrangements as to Admiralty causes, 2005.

*Courts—continued.*

*Commissary Court*, 2008; its history, *ib.*; abolished as separate court in 1836, 2009; inferior commissariots, 2010; present jurisdiction of Commissary Courts, 2012.

*House of Lords*, 2013; highest court of appeal in civil causes, *ib.*; history of right of appeal to Parliament, 2014; of what courts judgment carried directly to House of Lords, 2017; general rule as to Court of Session cases, 2018; in what cases there is no appeal, 2019; how judgments of House of Lords executed, 2020.

*Court of Justiciary*, 2021; Lord Justice-General is president, 2022; and Lord Justice-Clerk in his absence, *ib.*; five other Lords of Session are Commissioners of Justiciary, 2023; three are a quorum, *ib.*; Lord Advocate, Solicitor-General, and four advocates-depute prosecute in, 2024; private party may also prosecute, *ib.*; jury consists of fifteen, 2025; verdict of "not proven," *ib.*; special verdict, 2026; no appeal from Court of Justiciary, 2027; cannot review its own judgments, 2028; when it reviews those of inferior courts, *ib.*; arbitrary power, exceptions to, 2029; Peers amenable to Court of Justiciary for ordinary crimes, 2030; cannot try military or ecclesiastical offences, 2031; can punish innominate offences, 2032; Circuits of Justiciary, when and where held, 2033-4; constitution and jurisdiction of Circuit Courts, 2035-8.

*Inferior Courts*, 2039 *et seq.*

*Sheriff Court*, 2039; history of office of Sheriff, 2039-44; *Sheriff-depute*, 2045; history of constitution, 2045-7; heredi-



*Courts—continued.*

tary Sheriffs abolished by 20 Geo. II., c. 43, 2046; Sheriffs must be advocates of at least three years' standing, 2048; his present civil jurisdiction, 2050; criminal jurisdiction formerly very great, 2052; its present limits, 2053; procurator-fiscal is public prosecutor in Sheriff Courts, 2055; *Sheriff-substitute*, 2056; rules as to appointment of, 2057 *et seq.*

*Small Debt Courts*, 2060; Sheriff and Sheriff-substitutes the most frequent judges in small debt, *ib.*; prosecutor and defender state their own cases, 2061; procedure in court, *ib.*; no record kept, 2062; when appeal allowed to Justiciary or Circuit Court, 2063; jurisdiction of, 2064; Circuit Small Debt Courts, *ib.*; law of evidence, 2065.—*See Evidence.*

*Police Court of Sheriff*, 2068; Sheriff's Police Court in Edinburgh cumulative with that of civic authorities, *ib.*; jurisdiction of, 2069; period of imprisonment limited to sixty days, *ib.*

*Burgh Courts*, 2070; still held by magistrates for disposal of civil causes, *ib.*; magistrates in some burghs justices of the peace, *ib.*; special justices for Edinburgh, 2071; Edinburgh magistrates admirals of ports of Leith and Newhaven, 2072.

*Dean of Guild's Court*, 2073; jurisdiction, *ib.*; does not extend to portion of burgh brought under magistrates' jurisdiction by 19 and 20 Vict., c. 32, *ib.*

*Justice of Peace Courts*, 2075.—*See Justice of Peace.*

*Courts—continued.*

*Court of Lord Lyon*, 2111.—*See Lord Lyon.*

*Courts, Ecclesiastical*, their history and character, 2123.

*Kirk-session*, 2125; root of Presbyterian system, 2126; its constitution, 2126–8: its duties, 2129; power with reference to collection, 2130; relation to Board of Supervision, 2131.

*Presbytery* superior to kirk-session, 2132; bounds of jurisdiction fixed by General Assembly, 2133; present number of presbyteries, *ib.*; constitution, 2134; it examines candidates for the ministry, and grants licenses to preach, 2136; tries qualifications of presentees, *ib.*; ordains, inducts, and superintends them, *ib.*; superintends schoolmasters, 2137; is court of appeal from kirk-session, 2138; its functions as a civil court, 2139.

*Synod*, 2140; is superior to presbytery, *ib.*; sixteen in Scotland, 2141; its constitution, 2142; meets twice a year, 2143; is court of appeal from presbytery, 2145.

*General Assembly*, 2146; is highest ecclesiastical court, *ib.*; its constitution, 2147–9; time of meeting, 2150; Commissioner of Assembly, 2151; moderator, 2153; procurator and other officers, *ib.*; its legislative and judicial capacity, 2154; petitions to General Assembly, 2155.

*Commission of General Assembly*, 2156; its constitution, 2157; stated meetings, 2158; incidental meetings, *ib.*; when proceedings of General Assembly subject to review in civil courts, 2159; Presby-



- Courts*—continued.  
 terian dissenting bodies governed in same manner as the Established Church, 2160.  
 Crimes, public prosecutor of, 3, 2024, 2055, 2208.  
 Crimes prescribe in twenty years, 1290.  
 Criminal actions, 2208; conducted by public prosecutor, *ib.*; only requisite to give information to procurator-fiscal, 2209.  
 Criminal Courts.—*See* Court of Justiciary, 2021; Sheriff Court, 2052; criminal jurisdiction of Sheriff, *ib.*  
 Crime, when committed, what steps require to be taken, 2209.  
 Cropping, mode of, 1361.  
 Crop, landlord's hypothec over, 1366.  
 Crown, rights vested in, as representative of public, 1209 *et seq.*  
 Cruves, 6.  
 Curator ad litem to wife, 52.—*See* Marriage.  
 Curatory, 410.—*See* Guardianship.  
 Custody of Child, 283, 317, 372.—*See* Parent and Child; *see* also Guardianship.  
 Customs, the groundwork of legal arrangements, 1.
- Damage, inevitable effect of, on agricultural lease, 1348.  
 Damage, when master liable for, by servant's conduct, 647; when ship-masters, innkeepers, and stablers liable for, 1412; railway, when liable for, 1417; hackney coachmen, 1419; lodging-house keepers, 1421.  
 Damage by game, 1336; by vermin to town-house, 1381.  
 Damages, actions of, 1978.—*See* Jury Court.  
 Damages, when covered by Insurance, 1778.—*See* Insurance.  
 Date of bill, 1522.  
 Daughters, succession of, 793.—*See* Succession.  
 Days of grace, 1564.—*See* Bill.
- Dead's part, 972.  
 Dean of Faculty, 2166.  
 Dean of Guild's Court, 2073; application may be made to, where landlord refuses to indemnify for repairs, 1377.  
 Deathbed, law of, 916.—*see* Succession; lease granted on, when effectual, 1326.  
 Debt, Sheriff Small Debt Court, 2060; Justices' Small Debt Court, 2103.—*See* Courts.  
 Debt, Small, Court of, mode of raising or defending action in, 2061.  
 Debt, life policy assigned in security of, 1794.  
 Debt, securities for, 1858.  
 Debtor, 1443.—*See* Bankruptcy.  
 Decennial prescription, 1291.  
 Deeds, how executed by married women, 125 *et seq.*; for bequeathing heritage, 819 *et seq.*; for bequeathing moveables, 947 *et seq.*; rules for making a will, 975; form of will, 1001.  
 Deeds, execution of, 978 *et seq.*  
 Delectus personæ in partnership, 1593.  
 Deliberandi, annus, 818.  
 Delivery, 1075 *et seq.*; actual and constructive, 1085 *et seq.*—*See* Sale.  
 Depute, advocates, prosecute in Court of Justiciary, 2024.  
 Desertion, malicious, a ground of divorce, 226.  
 Destination of lease, 1344; in succession in general, 764.  
 Deviation from voyage, 1757.—*See* Insurance.  
 Diligence, what amount of, required in guardians, 389.  
 Diligence on bills and notes, 1580.  
 Discharge of bankrupt, 1484.  
 Discussion, 1693.—*See* Cautionary.  
 Dishonour of bills, notice of, 1571.  
 Disposition, 819.  
 Dissenters, Presbyterian, how governed, 2160.—*See* Courts, Ecclesiastical.

- Dissolution of marriage, 164 ; of a contract of partnership, 1600.  
 Division among co-cautioners, 1701.—*See* Cautionary.  
 Divorce, 202.—*See* Marriage.  
 Domestic servants, hiring of, 551.—*See* Master and Servant.  
 Domicile, wife's domicile follows husband's, 55.  
 Dominant and servient tenement, 1239.  
 Dominum directum and utile, 1171.  
 Donations between husband and wife, 156.  
 Dormant partners of a company, 1587.  
 Dovecots, 1274.—*See* Pigeon-houses.  
 Draft on banker, 1544.  
 Dramatic works, 1815.—*See* Copyright.  
 Drawer of a bill, 1509.  
 Drunkenness, 601.—*See* Master and Servant.  
 Ducks, wild, not game, 1340.  
 Duration of term of service, 549 *et seq.*  
 Duration of a contract of partnership, 1600.  
 Duty on bills and promissory notes, 1551.  
 Duty on succession, 1015.  
 Dwelling-house, lease of, 1369.—*See* Letting and Hiring.  
 Eases, communication of, among cautioners, 1700.  
 Ecclesiastical Courts, 2123. *See* Courts.  
 Edict nautæ, caupones, stabularii, 1412.  
 Eik to an inventory, 1009.  
 Engagement, 1308.  
 England, union with, its effects on the law of Scotland, 3.  
 Engravings, copyright in, 1816.  
 Enlistment, 563.—*See* Master and Servant.  
 Entails, origin of name, 844 ; general character, *ib.* ; history of entails in Scotland, 855 ; provisions of original Entail Act, 1685, c. 22, 846 ; first relaxations in favour of Estates, 850 ; provisions of 20 Geo. II., c. 50, *ib.* ; Montgomerie Act, 10 Geo. III., c. 51, *ib.* ; Aberdeen Act, 5 Geo. III., c. 87, its provisions, 851 ; Roseberry Act, 6 and 7 Will. IV., c. 42, its provisions, 853 ; 3 and 4 Vict., c. 48, and 4 and 5 Vict., c. 24, *ib.* ; provisions of the Rutherford Act, 11 and 12 Vict., c. 36, 854 ; provisions of 16 and 17 Vict., c. 94, 901 ; petitions and applications under Entail Act now go before Junior Lord Ordinary, 20 and 21 Vict., c. 56, 912.  
 Entry with superior, 1172.  
 Episcopalians, 28.  
 Equity, distinction between, and law, not recognised in Scotland, 1966.  
 Error in contracts, 1055.  
 Evidence, alterations in law of, 2065 ; witness is admissible notwithstanding relationship, *ib.* ; not excluded by crime, *ib.* ; may be examined with reference to credibility, *ib.* ; party may be examined, *ib.* ; agent may be examined, *ib.* ; parties themselves, husband and wife, cannot be examined against each other, 2066.  
 Evidence, damage, how proved against shipmasters, innkeepers, and stablers, 1412.  
 Evidence of resting owing, 1300.  
 Examination of bankrupt, 1480 ; of conjunct and confident persons, 1482.—*See* Bankruptcy.  
 Exchange, bill of, 1509.  
 Exchequer, Court of, 1984.  
 Executor, nomination of, in will, 987 ; confirmation of, 1005.—*See* Succession.  
 Facile persons, 490.—*See* Guardianship.  
 Factor, 385 ; on a trust, 1041 ; factor, judicial, 1452 ; factor, interim, *ib.*  
 False weights, 1099.  
 Farm, 1309 *et seq.*—*See* Letting and Hiring.

- Farm-servants' wages are privileged debts, 1012.  
 Father, power over children, 382 *et seq.*; obligations of, 290 *et seq.*—*See* Parent and Child.  
 Feal and divot, 1248.  
 Fear invalidates contracts, 1056.  
 Fee and liferent, 838.  
 Fences, 1359.  
 Feudal law, 1168.  
 Feu charter, 1170.  
 Fiars prices, striking of, 1102.  
 Fire insurance, 1768.  
 Fire, liability of carriers for loss by, 1422.  
 Firm, signing, 1590.—*See* Partnership.  
 Fiscal, Procurator, 2055.—*See* Sheriff Court.  
 Fisheries, convention regarding, between England and France, 1224.  
 Fisheries, salmon, 1221.  
 Fisk, or exchequer, 1860.  
 Fixtures under agricultural lease, 1351.  
 Flumenis, servitude of, 1256.  
 Force and fear invalidates contracts, 1056.  
 Foreign bill of exchange, 1510.  
 Foreigners entitled to relief under Poor Law, 1909.  
 Foxes, tenant may kill, 1340.  
 France, effects of connection with, on the law of Scotland, 3; internationalization with, *ib.*; College of Justice, and other judicial arrangements, borrowed from, *ib.*  
 Fraud, 1057.  
 Freight, 1394.  
 Fruit-trees, statute for preserving planting includes, 1333.  
 Fuel, servitude of, 1249.  
 Fugæ, meditatio, warrants granted by justices, 2094.  
 Funeral expenses a privileged debt, 1012.  
 Furniture, landlord's hypothec extends to, 1387.  
 Game, 1276, 1336.  
 Gaming debts, 1066.  
 Gazette notice of dissolution of partnership, 1614.  
 Gardeners may remove hothouses on termination of lease, 1358.  
 General Assembly, 2146.—*See* Courts, Ecclesiastical.  
 General legacy, 993.  
 German, or full blood, 787.  
 Glebe, 1268.—*See* Property.  
 Goods, community of, 105.—*See* Marriage.  
 Governors same as tutors, 345.  
 Grace, days of, in bills and notes, 1564.  
 Guarantee Associations, 1688, 1723.  
 Guardianship, 325; divided into tutory and curatory, *ib.*; object of tutory, 326; object of curatory, 327; tutor grants deeds, curator consents, 328; periods of life to which they apply, 329; Roman law, 330.  
*Tutary*—pupils must act by their tutors, 331; reverse the case when they are merely passive, *ib.*; deeds granted and contracts entered into by pupil valid when they are beneficial to himself, 332; how pupil sues, 333; tutor *ad litem* when required, 334; tutor may be appointed to unborn child, 335; father is both tutor and curator, 336; he is called administrator-at-law, *ib.*; mothers and grandfathers cannot be, without appointment, 337; father of bastard not his administrator-at-law, 338; where child acquires property from third party, 339; disqualifications from religious opinions, 340; outlaws ineligible, and aliens, *ib.*  
*Testamentary tutors*—who may appoint them, 341; may be either male or female, if latter unmarried, 342; must be twenty-one, *ib.*; father cannot nominate tutors to bastard children, but may appoint manager of funds left them, 343; how tutors may be appointed, 344; "governors"

*Guardianship—continued.*

may be used for tutors in deed of appointment, 345; do tutors fall under the Act 24 and 25 Vict., c. 84, *ib.*; several tutors may be appointed, 346; testamentary tutors require no service, 347; do not require to take the oath de fideli, or find caution unless insolvent, 348; must make up inventories, 349; their liabilities, 350; may be declared not liable for omissions, *ib.*; factors may be appointed by father, 351.

*Tutor at law*, 352; is the nearest male agnate, 353; female cannot be, *ib.*; bastards cannot have tutor at law, 354; tutor at law must be twenty-five, 355; appointment is by service, 356; proceeding of service subject to review, 357.

*Tutor dative*, 358; formerly appointed by Court of Exchequer, now by Court of Session, 359; whom court prefers, 360.

*Tutors may accept or decline*, 361; tutors at law and dative must find caution, 362.

*Tutorial inventories*, 363; appointed to be made by 1672, c. 2, *ib.*; nearest of kin must be cited, 364; if nearest of kin refuse to appear, inventories will be made up before judge ordinary, 365; what inventory must contain, 366; inventory must be prepared though pupil has only one possession, 368; inventories now required to be lodged with accountant of court, *ib.*; tutors testamentar require to make inventories, but not under provisions of Pupils Protection Act, 369; fathers not required to make inventories, 370; debtors of pupil not bound to pay, unless sums contained in inventories, 371.

*Custody of Child* belongs to father,

*Guardianship—continued.*

372; father's nominee preferred, *ib.*; failing father's nomination, mother entitled to, 373; she will lose it if she enters into a second marriage, 374; if tutor be pupil's heir, he will not have custody, 375; when such the case, failing mother, nearest cognate is chosen, *ib.*; where he is of loose and dissolute habits, he will not be chosen, *ib.*; Court of Session regulates custody, 376.

*Education* entrusted to tutors, 377; court will interfere at instance of tutors when mother has custody, *ib.* and 378; father's injunctions must be followed, 379.

*Tutor cannot change the succession*, 380; but succession will be changed if subject altered by any cause over which tutor has no control, 382; tutor cannot speculate with pupil's funds, 383; tutor's power to carry on father's business, 384.

*Tutor may appoint factor*, 385; his liability for him, *ib.*; salary, 386; if tutor be factor, he has no salary, unless authorized by deed, 387; tutor cannot lend to or borrow from pupil, 388.

*Diligence required by different kinds of tutors*, 389 and 390; fathers only liable for gross negligence, 390; tutors liable, though they have not interfered in management, 392; amongst themselves, tutors liable for actual intromissions, 393; all except testamentary tutors are now under the provisions of the Pupils Protection Act, 394.

*Termination of tutory*—(1) pupils arriving at puberty, 396; (2) death of tutor or pupil, 397; (3) marriage of female tutor, 398; (4) occurrence of contingency, 399; (5) resignation, 400; (6) removal as suspect, 401;

*Guardianship—continued.*

what incapacity is a ground for removal, 402; who may raise action of removal, 404; all tutors may be removed, 405; action of count and reckoning, 406; action at instance of tutor, 407; tutory is gratuitous, 408; action of accounting prescribes in ten years, 409.

*Curatory*—its objects, 411; minor may perform all the acts of major without curators under certain qualifications, 412; quadriennium utile, *ib.*; effect of deed by minor having curators without their consent, 413; minor may test, 414; sell heritage, *ib.*; cannot convey it gratuitously, *ib.*; minor cannot hold a public office, 415; cannot be a juror, 416; nor a commissioner of supply, *ib.*

*Who may be curators*, 417; how appointed—(1) *ipso jure*, 419; in this way father is curator, *ib.*; need not adopt proceedings to vest office, *ib.*; minor cannot choose curators during father's lifetime, 420; except where property left excluding father's administration, 421; grandfather not curator *ex lege*, 422; father not curator to bastards, 423; husband curator of wife, 424; (2) *by testament*, 425; not obliged to find caution, 427; (3) *by choice of minor*, 428; citation of next of kin, *ib.*; how dispensed with when minor bastard, 429; or where there are none, 430; (4) *by Court of Session*, 431.

*All curators may decline*, 432; are bound to make up inventories, 433; difference between duties of tutor and curator, 434; powers and duties of all curators are alike, 435; curator has no power over minor's person, 436; whether father has power over his minor children, 436;

*Guardianship—continued.*

should advise as to his education, but cannot compel it, 437; same as to occupation, 438; when minor and curator differ, latter will be relieved, 439; curator responsible though he does not act, 440; diligence incumbent on curators same as tutors, 441; termination of curatory and removal of curators same as tutory, 442–3; curatory is gratuitous, 444; date of acceptance of office the period from which accounting begins, 445; minor cannot alter succession to heritage with curators' consent, 446; but he may sell heritage and test, *ib.*; minority and lesion, what, 447; marriage contracts may be reduced, though marriage cannot, 448; no restitution in payment of ordinary debts, 449; law modified where minor engaged in trade, 450; no restitution when minor holds himself out as major, 451; rule when both parties minors, 452; minor must claim restitution within four years, 453; what deeds this rule applies to, 454; minor not bound to plead in any suit regarding his parental heritage, 455.

*Pro-tutors and procurators*—what they are, 456; not favourites of the law, 457; their liabilities, *ib.*; may be called upon at any time to account or resign, 458; entitled to credit for all sums disbursed profitably, 459.

*Factors loco tutoris and curators bonis*—extent to which they have superseded private guardians, 460; are under the Pupils Protection Act, 461; are generally professional persons, 462; females not appointed, 463; ministers may be appointed, 464; only one person

*Guardianship—continued.*

appointed, 465; how court acts when competition for office, 466; a bankrupt ineligible, 467; so is stepfather, *ib.*; how appointed, 468; where minor illegitimate, 469; name of person suggested must be in petition, 470; where urgent necessity, person suggested will be appointed interim factor, 471; provisions of Pupils Protection Act, 472–85.

*Cautioners for guardians*—for what guardians required, 486; should provide that the principal should be discussed, 487; their liabilities, 488; policies of Guarantee Association allowed, 489.

*Guardianship for insane and facile persons*—sovereign is guardian as pater patriæ, 490; his duties delegated to tutors and curators, *ib.*; nearest male agnate entitled to guardianship, *ib.*; party may, in anticipation of insanity, appoint guardian, 491; father guardian of insane children, 492; but after majority child must be cognosced, 493; *tutors at law*—procedure of appointment, 494; who may take out brieves, *ib.*; nature of brieves, *ib.*; question put to jury, *ib.*, note 1; proceedings at inquest, 495–7; husband tutor to wife, 498; who appointed when nearest agnate declines, 499; guardians to insane subject to Pupils Protection Act, 500; termination of office, 501; convalescence, *ib.*; court cannot authorize tutor to resume management, if person should relapse, 502; resignation of tutor, 503.

*Curators bonis to the insane appointed by the Court of Session*—appointed where no other guardians, 504; to whom application to be made, *ib.*; petition

*Guardianship—continued.*

must be served on fatuous person, 505; and accompanied with a medical certificate, *ib.*; how court proceed when application opposed, 506; curator bonis no power over person, 508; how office terminates, 509, 510; deeds may be reduced although there be no cognition, 511.

*Interdiction*—to what degree of mental imbecility to which applicable, 512; (1) voluntary interdiction, 514; form of bond, 515; how completed, 516; (2) judicial, 517; who may raise action, 518; when opposed, 519; must be published and registered, 520; duties of interdictors, 522; interdiction confined to heritage, 523; prodigus may make a settlement mortis causa, 524; may grant rational and onerous deeds, 525; diligence may proceed on obligations of prodigus, but not to affect heritage, 526; prodigus may vote at elections, 527; termination of interdiction, voluntary and judicial, 528.

Guild, Dean of, 2073.

Hackney coachmen, if responsible for goods, 1419.

Hæreditas jacens, 777.

Harbours, 1225.

Heirs, 792 *et seq.*—*See Succession.*

Heir of tailzie, 844.—*See Entail.*

Heirs portioners, 793.

Heirs ultimus, 806.

Heirship, moveables, 763.

Heralds, 2111.—*See Lord Lyon.*

Heritage, sale of, 1164.—*See Sale.*

Heritable property, rights and burdens attaching to, 1208.—*See Property.*

Heritable and moveable, 758.—*See Succession.*

Heritors, obligations of, in building churches, 1264; management of poor, 1884.—*See Poor.*

- Herring fishery, 1224.  
 Highway, 1209.  
 High treason, prescription of, 1304.  
 Hiring, contract of letting and, 1306.  
 Holding, different kinds of, 1172 *et seq.*  
 Holidays, 606.—*See* Master and Servant.  
 Holidays in bills, 1564.  
 Holograph writings prescribe in twenty years, 1289.  
 Homologation, 1064.  
 Honour, acceptance of bill for, 1536.  
 Horses, implied warranty in sale of, abolished, 1133.  
 Hours of labour, 603.—*See* Master and Servant.  
 House of Lords, 2013.  
 House, renting of, 1369.  
 Houses, repairs of, 1374.  
 Housekeeper or daughter may contract for necessities, 71.  
 Hunting and shooting, 1336.  
 Husband and wife, 10.—*See* Marriage.  
 Husbandry, good, 1350.  
 Hypothec, landlord's, in agricultural lease, 1365; in houses and shops, 1387.  
 Hypothec of landlord saved from operation of Mercantile Law Amendment Act, 1143.  
 Hypothec of law agent over title deeds, 2194.—*See* Agent and Client.  
 Idiots cannot marry, 15; curatory of, 490—*see* Guardianship; entitled to relief under Poor Law Act, 1907.  
 Illegitimate children, 263 *et seq.*—*see* Parent and Child; aliment of both father and mother liable for, 309; custody of, 317.  
 Immoral contracts, 1065.  
 Impediments to marriage, 36.  
 Implied conditions in sale, 1097.  
 Impotency, 37.  
 Imprisonment for debt, 1449; for crime, 2209.  
 Imprisonment, action for wrongous, prescribes in three years, 1303.  
 Imprisonment of servant, 577.  
 Improvements on house, 1374 *et seq.*—*See* Letting and Hiring.  
 Incest, 43.  
 Incorporeal moveables, 765.  
 Indenture, 722 *et seq.*—*See* Master and Apprentice.  
 Indorsement, 1538.—*See* Bill.  
 Infeftment, 1180.—*See* Sale.  
 Inhibition, 88.—*See* Marriage.  
 Inhibition on an heritable security, 1875.—*See* Securities for Debt.  
 Initials, subscription by, 984–1524.  
 Inland bills, 1513.  
 Innkeepers, liabilities of, 1412.—*See* Letting and Hiring.  
 Inquest on a service, 929.  
 Insanity of servant, 575.—*See* Master and Servant.  
 Insane and facile persons, guardianship of, 490.  
 Insolvency, 1443.—*See* Bankruptcy.  
 Institute, 823.  
 Instrumentary witnesses, 978 *et seq.*  
 Inspector of poor, appointment of, 1896.  
 Insurance, objects of, 1737; premium, *ib.*  
*Marine Insurance*, 1739; underwriters, *ib.*; middleman or broker, *ib.*; no insurance where no interest, 1741; gaming insurances suppressed by statute, *ib.*; insurable interest, what, *ib.*; seamen's wages cannot be insured, *ib.*; prohibition extends to mate and inferior officers, not to captain or master, *ib.*; insurance which involves a breach of law null, 1742; risks to which marine insurance applies, 1743; policy, 1744; slip, 1745; formalities in execution of policy, 1746; effect of mercantile usage in construing, 1747; policy bears receipt of premium, 1748; misrepresentation materially affecting risk is



*Insurance—continued.*

fatal, 1749; warranty, 1750; express warranties, 1751; implied warranties, 1753; seaworthiness, 1754; it signifies nothing whether insured was aware of ship's condition or not, 1756; non-alteration of the voyage, 1757; non-deviation, *ib.*; mere intention to deviate will not discharge underwriter if ship lost before deviation, 1758; nor if deviation was necessary, 1759; total loss, 1761; when held to be total loss, 1762; abandonment, 1763; partial loss or injury, 1764; capture and arrest by princes, 1765; reinsurance, 1766; double insurance, 1767.

*Fire insurance*, 1768; premium, 1769; policies without interest forbidden, 1770; real interest, what, 1771; floating insurance, 1772; what can be sued for under such, 1773; policy, how executed, and what it implies, 1774; warranty, 1776; what policy covers, 1778-9; insured must give proof of amount of injury, 1780; must give notice of other insurances, 1781; no abandonment in fire insurance, 1782; loss generally settled by arbitration, 1783; foreign companies, insurance by, 1784.

*Life insurance*, 1785; premium, 1786; there must be interest, 1787; creditor has insurable interest, 1788; question if father has in son's life, 1789; wife and children have in father's life, 1790; death abroad or at sea, 1791; by suicide, duelling, or hand of justice, 1792; life policies assigned in security of debt, 1794; assignment in sequestration carries policy, *ib.*; deductions of annual premiums from income tax, 1795.

Interdiction, 512.

Interruption, 1284.—*See* Prescription.

Interventus, rei, 1063.

International copyright, 1822.

Interest, 1864.

Invention, 624, 1830.—*See* Patent.

Inventories of tutors, 363; in confirmation of executors, 1009.

Jews, 27.

Joint trade, 1628.—*See* Partnership.

Joint ownership, 1629.—*See* Partnership.

Joint-stock companies, 1630.—*See* Partnership.

Joint-Stock Companies' Registry Office, 1640.

Joint-Stock Companies' Act, 1641.—*See* Partnership.

Jointure, 259.—*See* Marriage.

Judges, supreme, 1945 *et seq.*

Judicatum solvi caution, 1730.

Judicial factor, 1457.

Judicial proceedings, 2196.

Judicial caution, 1727.

Judicial ratification of wife, 48, 126.

Juratory caution, 1784.

Jurisdiction of Court of Session, 1959.

Jus mariti, how excluded, 112; husband may revoke renunciation of, 160.—*See* Marriage.

Jus relictæ, 188.

Justice, College of, 1967.

Justice-Clerk, Lord, 2022.

Justice-General, Lord, 2022.

Jury Court, 1969; jury in Court of Justiciary, 2025; Justiciary, Court of, 2021—*see* Court; no appeal from to House of Lords, 2019.

Justice of peace, 2075; office is of English origin, *ib.*; history of its introduction into Scotland, 2076; quarter sessions, *ib.*; Treaty of Union, its provisions with reference to justices of the peace, 2077; commission of justices fall by demise of Crown, 2078; officials who are justices *ex officio*, 2079; solicitors and procurators in inferior courts cannot act as jus-



- tices, 2080; no qualification of rank or property required, 2082; no pecuniary recompense, *ib.*; sums actually expended reimbursed, *ib.*; quarter sessions, days for holding, 2083; petty sessions, when called, 2084; judgments of, reviewed by quarter sessions, 2085; quorum, 2086; one justice cannot act as judge, but may grant warrant, 2087; appeal to Circuit Court competent both from petty and quarter sessions, 2088; regulation as to voting in bench of justices, 2089; limits of jurisdiction of justices, 2090; servants' wages, 2092; actions for aliment, 2093; warrants in meditatione fugæ, 2094; warrant of lawburrows, 2095; justices in Scotland do not try by jury, 2096; limits of their criminal jurisdiction, *ib.*; whipping, may pronounce sentence of, and hard labour, 2098; powers in revenue questions, 2099; their jurisdiction under the General Road Act, 1211; they grant licenses to publicans, 2100.
- Justices' Small Debt Courts, 2103; code for their guidance, in what statutes contained, 2104; jurisdiction confined to cases not exceeding L.5, 2105; proceedings before them, 2107; their sentences, when subject to review, 2109.
- Justice of Peace Clerk, 2110; is practically assessor to justices, *ib.*; appointed by crown, *ib.*
- Kelp, right of taking, not included in parts and pendicles of farm, 1335.
- Kin, next of, of wife no right to any share of goods in communion, 960.
- Kirk or market, going to, 918.—*See Deathbed.*
- Kirk session, 2125.—*See Courts, Ecclesiastical.*
- Labour, hiring of, 529.—*See Master and Servant.*
- Lading, bills of, 1407 *et seq.*; pass by indorsation, 1538.
- Land, sale of, 1164.—*See Sale of Heritage.*
- Landlord and tenant, 1309.—*See Letting and Hiring.*
- Law, practitioners of, 2161; divided into various classes, *ib.*; advocates, 2162; writers to the signet, 2173; solicitors before the Supreme Courts, 2183; solicitors-at-law, 2187; provincial writers, 2189; notaries public, 2191.
- Law agent, 2193.—*See Agent and Client.*
- Lawburrows, 151.—*See Marriage.*
- Lawful children, 263.—*See Parent and Child.*
- Lease, 1309.—*See Letting and Hiring.*
- Leases, agricultural, made effectual against singular successors by statute 1449, c. 18, 1314.
- Lectures, copyright in, 1819.
- Legacy, 989; good, though error in name, if no doubt as to person, 989; if legatee predeceases, legacy does not transmit to representatives, 990; universal legacy, 992; general legacy, 993; special legacy, 994; ranking of legacies, 995; conditional legacy, 996; substitutions, 997; examples of, 998.
- Legacy duty, *jus relictæ* does not pay, 195.—*See also Succession.*
- Legitim, 201–970.—*See Succession.*
- Legitimacy, presumptions for, 267 *et seq.*—*See Parent and Child.*
- Legitimation 273 *et seq.*—*See Parent and Child.*
- Lesion, minor restored against deeds to his hurt, on proof of, 412–447.
- Lesser terce, 175.
- LETTING AND HIRING, CONTRACT OF, 1306; principles of contract of sale applicable to, 1307; called lease or tack when applied to land, 1308; agreement, when applied to house or shop, *ib.*; engagement, when applied to services, *ib.*

*Letting and hiring—continued.*

*Lease, agricultural*, 1309; what constitutes a tack, *ib.*; *verbal lease*, 1310; effectual for one year, *ib.*; effect of rei interven-tus on, *ib.*; may be proved by oath of grantee, *ib.*; *written lease*, 1311; must be written on stamped paper, and authen-ticated as a probative deed, *ib.*; defects in formality, how sup-plied, 1312; in what form leases may be granted, 1313; provi-sions of statute 1449, c. 18, 1314; what requisite to bring a lease under provisions of sta-tute, 1315; length of leases, 1316; statute will not cover leases of great length, though period be definite, 1317; build-ing leases, *ib.*; liferent leases, *ib.*; to what subjects statute ap-plies, 1318; provisions of statute 20 and 21 Vict., c. 26, as to registration of long leases, 1319; *granter's title*, 1320; in heritable subjects, grantee's title should be completed, 1321; hus-band's power to grant leases, 1322-3; powers of tutor, 1324—*see* Guardianship; powers of minor, 1325—*see* Guardianship; lease granted on deathbed, 1326; granting a heritable bond does not take away power of leasing, 1327; bankruptcy or sequestration makes leases sub-sequently granted liable to chal-lenge, 1327; trusts transfer powers of leasing to trustees, *ib.*; effects of entail on powers of leasing, 1328; liferenter's powers, 1329; *powers which the granter is presumed to reserve*, 1330; mines and minerals, 1331; trees and wood, 1332; what in-cluded under statute 1698, c. 16, 1333; tenant liable for injury done by his family and servants, 1334; kelp, 1335; hunting and shooting, 1336; tenant cannot

*Letting and hiring—continued.*

kill game, 1337; when entitled to damages for injury by, *ib.*; not entitled to scare away game, 1338; rabbits not game, 1339; nor wood pigeons, 1340; these and vermin can be killed by tenant, 1340; tenant cannot kill tame pigeons, but may scare them away, 1341; nor fish for trout in a river passing through his farm, 1342; right of passing over the farm, 1343; landlord may ride or walk over farm, *ib.*; but cannot enter a house or garden, *ib.*; *destination of the lease*, 1344; commonly settled by convention, *ib.*; interpreta-tion of stipulations, *ib.*; *trans-mission of the lease*, 1345; power of subletting not implied in a lease for nineteen years, *ib.*; implied in lease beyond that period, *ib.*; where sublease is given, original tenant remains bound, 1347; *inevitable damage*, 1348; *conditions of the lease*, 1349; warrandice, what it im-plies on landlord's part, *ib.*; on tenant's part, 1350; remov-ing fixtures, 1351; fixtures, what, *ib.*; questions decided in Scotland as to, 1353-6; in Eng-land, 1357-8; fences, 1359; cannot be removed by tenant, *ib.*; tenant not bound to leave them in repair, *ib.*; rule as to tenant removing his fixtures, 1360; mode of cropping, 1361; *removing*, 1362; warning, *ib.*; must be forty days before term of removal, 1363; provisions of 16 and 17 Vict., c. 80, as to, 1364; *landlord's hypothec*, 1365; to what it extends, *ib.*; over crop, 1366; cattle and stocking, 1367; tenant cannot retain rent for illiquid claims of damages, 1368.

*Letting of houses, shops, and other subjects*, 1369; principles same

**Letting and hiring—continued.**

as in agricultural lease, *ib.*; furniture and machinery given over by inventory, 1370; written leases of urban tenements, 1371; tenant entitled to sublet and assign, 1372; lease of houses with shootings or other subjects protected, 1373; repairs, landlord bound to make, 1374; when tenant may claim compensation, 1375; application to Dean of Guild, 1377; landlord may enter house for inspection, 1378; when tenant must repair, 1379; vermin, tenant may throw up lease if house uninhabitable from, 1381; *removing*—formal warnings necessary, 1382; forty days timeous warning, 1383; sufficient if tenant gives up house forty days before term, 1384; in country houses formal warning necessary if land attached, 1385; *hypothec*, landlord's, in houses, to what it extends, 1387-8; effects of travellers in inn, and lodgers in lodging-houses, not liable, 1389; furniture hired for permanent use subject to *hypothec*, 1390; *hypothec* in shops and warehouses, 1391; bankruptcy of lessor or lessee, effect of, 1392.

**Letting and hiring of ships, 1394;**

ship may be let either on charter party or general freight, *ib.*; charter party, what, 1395; freight, what, *ib.*; whole space agreed for must be paid for, 1396; charter party must be stamped, 1397; conditions implied on part of owner, 1398-1403; on part of freighter, 1404-6; bill of lading, what, 1407; generally drawn in sets of three, 1408; general rule as to ship-owner's liability, 1409; no liability for gold, etc., 1410; liability for embezzlement of servants, 1411.

**Letting and hiring—continued.**

*Shipmasters, innkeepers, and stablers*, 1412; liable for goods under Edict Nautæ Caupones Stabularii, 1412; how damage proved, *ib.*; cases in which liability does not exist, 1413-14; liability of companies under Railway and Canal Traffic Act, 1414; innkeeper not liable if guest undertakes charge of his goods, 1415; innkeeper may detain property of guest who refuses to pay his bill, 1416; railway, when liable for luggage, 1417; carters and porters are carriers, 1418; whether hackney coachmen are, 1419; wharfingers and warehousemen are not, 1420; whether lodging-house keepers are, 1421; how decided in England, *ib.*; provisions of Mercantile Law Amendment Act as to loss from fire, 1422.

Lessor and lessee, 1306.—*See* Letting and Hiring.

Liability, limited, 1631.—*See* Partnership.

Libraries, public, entitled to copies of books entered at Stationers' Hall, 1806.

Licenses to publicans, 2100.—*See* Justice of Peace.

License to preach, 2136.—*See* Presbytery.

License to publish by Privy Council, 1805.—*See* Copyright.

Lien, 1423.—*See* Pledge.

Lien for wages, 664, 1425.

Life insurance, 1785.—*See* Insurance.

Liferent, 173.—*See* Terce.

Liferent, fee and, 838.

Liferenter, his powers of letting, 1329.

Light, servitude of, 1257.

Limitation, 1277.—*See* Prescription.

Livery servants, 663.

Locality, 258.

Location, 1306.—*See* Letting and Hiring.

**Locus penitentiae**, 1061.

**Lodging-house keepers**, liability of, 1421.

**Lords, House of**, 2013.

**Lord Lyon**, Court of, 2111; he is chief herald for Scotland, *ib.*; has jurisdiction over heralds, pursuivants, and messengers-at-arms, *ib.*; his jurisdiction with reference to arms, 2112; register, 2113; can grant new arms to virtuous and well-deserving persons, 2114; his judicial capacity, 2115; in granting new bearings, Lyon's acts are ministerial, 2116; not so where there is another claimant, *ib.*; in latter case, Court of Session will have jurisdiction in an action brought by party aggrieved, *ib.*; fees payable on a grant of new arms, *ib.* Note;—if heir of entail enjoined to bear entailer's arms, he must obtain arms of the proper description, 2117; view of the law in regard to changing names, 2118 *et seq.*; not necessary to apply to court for authority to do so, 2119; the Lord Lyon will not grant authority, 2120; if person has already changed it, he will grant him arms under his new name, *ib.*; and will certify the fact, *ib.*; this certificate held good, *ib.*; law on this subject same as in England, 2121; register for genealogies, 2122.

**Lost or stolen bills**, 1579.

**Luggage**, 1389–1412 *et seq.*

**Lunatics**, 490.—*See* Guardianship, 1907; *see* Poor.

**Machinery of the law**, 1948 *et seq.*

**Machinery**, 1830 *et seq.*—*See* Patent.

**Machinery**, tenant entitled to remove, 1354.

**Magistrates**, 2070 *et seq.*—*See* Court.

**Mailles and duties**, 1878.

**Majority**, 329; by Roman law, 330.

**Managers**, hiring of, 553.

**Mandatory**, 1523, 1539.—*See* Procuration.

**Mandate to appear judicially for party in a suit**, 2195.—*See* Agent and Client.

**Mandate**, 1589.—*See* Partnership.

**Manse**, 1267.—*See* Property.

**Mansion house**, eldest heir portioner has exclusive right to, 796.

**Marine insurance**, 1739.—*See* Insurance.

**Mariners**, 707.—*See* Master and Servant.

**Married women**, how deeds executed by, 125 *et seq.*

**MARRIAGE**, *Constitution of*, 10; a civil contract constituted by consent, *ib.*; how consent proved, 11; not in all respects same as other contracts, 12; consent must be voluntary, 14; parties must be capable of giving it, *ib.*; idiots, madmen, and pupils cannot marry, 15; contract invalidated by force, fear, error, or intoxication, *ib.*; age at which males and females may marry, 16; effects of extreme youth, 17; consent of parents and guardians not required in minority, and does not enable pupils to marry, 18; consent must be to a present act, 19; ante-nuptial contracts and promises to marry may be resiled from, *ib.*; they are grounds for action of damages, *ib.*; where sexual intercourse has taken place after promise, 20; does this of itself constitute marriage? 21; damages for seduction may form an alternative conclusion in an action of declarator, 22.

**Regular marriage**, ordinary form of, 23; do not require to be in church, 24; must be preceded by banns, 25; regulation as to publication of, 26; registration of marriage, 27; proclamation in Scotland valid in England, *ib.*; foreigners, soldiers, and sailors may be proclaimed in

**Marriage—continued.**

Scotland without residence, *ib.* ; dissenting clergymen may marry, 28 ; Episcopalians, *ib.* ; form of marriage service, 29.

**Irregular and Clandestine marriages**, distinction between them, 30 ; the latter expose parties to penalties, *ib.* ; no particular form of consent is required, either verbal or written, 31 ; example of an irregular marriage, 32 ; consent will be inferred from habit and repute, 33 ; the cohabitation must have been in Scotland, nor the repute confined to a few individuals, *ib.* ; if connection has begun in concubinage, change of purpose will be required in aid of proof, 34 ; one of the parties must have lived in Scotland for twenty-one days before marriage, 35 ; regulations of 19 and 20 Vict., c. 96, for registration of such marriage, *ib.*

**Impediments to marriage**—impotency a bar, 37 ; cannot be pleaded by a third party, *ib.* ; when judicially established, held no contract ever existed, *ib.* ; previous marriage, while subsisting, 38 ; adultery an impediment to marriage with adulterer, 39 ; relationship within certain degrees, 40 ; no difference between full and half blood, 41 ; degrees prohibited in consanguinity are so in affinity, 42 ; marriage with deceased's wife's sister unlawful, 43 ; the connection, if wife alive, held to be incest, *ib.*

**Effects of marriage on status and property**—wife's person sunk in husband's, 44 ; she takes his name and rank, *ib.* ; he is her curator, *ib.* ; he manages the common fund, *ib.* ; provisions of 24 and 25 Vict. regarding acquisitions of wife during

**Marriage—continued.**

marriage, 45 ; in case of desertion, wife may apply to court to protect such property from husband and his creditors, *ib.* ; wife's personal obligations invalid, 46 ; cannot grant bonds or bills, *ib.* ; husband's consent will not validate wife's obligation, 47 ; husband's consent with wife's ratification validates bonds granted by her over her separate heritage, 47 ; object and effect of ratification, 48 ; wife can reduce it if granted through force and fear, 48 ; deed not reducible though not ratified, *ib.* ; wife cannot be sued, 49 ; not even after death of husband as regards obligations entered into during subsistence of marriage, *ib.* ; in case of separation under 24 and 25 Vict., c. 86, she may be sued, *ib.* ; she may insist on obligations entered into with her by others who knew she was married, 50 ; but wife must perform her part of the contract, *ib.* ; exceptions to rule, that wife's personal obligations are null, 51 ; if subject of debt has been applied for her benefit, contract will be effectual against her separate estate, 51 ; (1) wife can execute testament as to her separate estate without husband's consent ; (2) cannot test in regard to her portion of goods in communion, *ib.* ; where wife holds herself out as unmarried, she will be bound, 51 ; (3) if wife incurs a fine for a crime, her person cannot be attached, but her separate estate may, *ib.* ; (4) she may be imprisoned as a criminal, *ib.* ; where husband civilly dead, wife's obligations valid, *ib.* ; (5) and where husband insane, 51 ; (6) where spouses are separated, wife's

**Marriage—continued.**

aliment may be attached for her debts contracted for necessities, *ib.*; (7) same where judicially separated, *ib.*; (8) where wife, in case of desertion, has got order from court under 24 and 25 Vict., c. 86, obligations by her in regard to such property will be valid, *ib.*; (9) if wife is compelled to live separate from husband, debts contracted by her for necessities will be binding on him, *ib.*; (10) same where she is deserted, *ib.*; where husband abroad, wife's obligations for necessities effectual, *ib.*; (11) if, in such a case, she enters into business, contracts relative thereto may be enforced by diligence against her, *ib.*; when husband returns, obligations for necessities may be enforced against him, *ib.*; curator ad litem appointed to supply place of husband where wife has separate interest, 52; also where husband abroad, insane, in banishment, has an unknown residence, or refuses to concur, *ib.*; wife not allowed to sue husband except on necessary or urgent occasions, 54; domicile of wife follows husband, 55.

*Husband's liability for wife's debts* contracted before marriage, 56; liable for wife's marriage clothes, 57; not liable for ordinary clothes if she resided with her father, *ib.*; husband continues liable for her debts though he has renounced his right of administration, 58; liability for debt after proclamation of banns, 59; liability ceases after dissolution of marriage, 60; execution cannot take place against wife during marriage, *ib.*; husband's heritable and moveable property may be attached, 61; may claim

**Marriage—continued.**

relief from separate heritable estate of wife, 62; liable for heritable debts when lucratus by marriage, 63; when is husband lucratus? 64; court fixes what is a competent tocher, 65; when he is lucratus, liable after marriage dissolved, 66; if he has acquired all her property, liable for all debts, 67; wife's heirs liable before husband, 68; wife is domestic manager, and can bind her husband in that respect, 70; same rule holds as to a daughter or housekeeper, 71; but only for necessities, 72; tradesmen must exercise discretion as to what are necessities for a person in husband's condition, 73; husband liable if he does not return goods when in his power to do so, 74; presumption repelled by showing that tradesmen relied on wife's credit alone, 75; husband liable for dress worn in his presence without objection, 76; liable though he have given wife money to pay debt, which she misapplied, 77; wife cannot borrow money as manager, 78; if husband has acknowledged debt, he will be liable, 79; wife cannot sell or pledge husband's property, 80; she may hire servants, 81; her separate estate is not liable for necessary debts, 82; when wife husband's mandatory, 83; husband's consent presumed when he has for a length of time fulfilled wife's engagements, 84; when wife husband's commissioner, 85; factor or agent, *ib.*; but in general no act is excepted from his curatory, 86; wife cannot enter into a contract of partnership with husband, 87.

*How husband ceases to be liable for wife's debts*—inhibition, nature

*Marriage—continued.*

of, and when used, 88; its form, 89; execution of, 90; no notification necessary to merchants, 91; not effectual unless husband provide wife with aliment, 92; husband may, after executing, tacitly depart from it, 93; private notice to tradesmen same effect as inhibition, 94; separation terminates *præpositura*, 95; except where debt incurred for necessities, *ib.*; where husband turns wife out of doors, he is still bound to maintain her, 96; not if she leaves him without sufficient cause, 97; wife must assign a cause for leaving which a court and jury can entertain, 99; adultery of husband sufficient cause, 100; if no inhibition used or notice given, husband has to prove that tradesman knew of separation, 101; held in England, that if tradesman knew of separation, he must shew it took place so as not to free husband, 102; if during desertion wife become insane, husband bound to maintain her, 103; his liability at an end when he makes wife allowance, 104.

*Of the community of goods*—how law originated, 105; doctrine of the law of Scotland in regard to, 106; wife's claim simply a right of debt, 107; wife's representatives have no claim, 108; distinction as to marriage being dissolved within year and day removed, 109; heritable estate of wife does not fall under, 110.

*How husband's power is excluded*—it may be by nature of the subject, by implication or expressly, or by the provisions of 24 and 25 Vict., c. 86, 112; he cannot affect her separate pro-

*Marriage—continued.*

vision, 113; wife cannot assign alimentary fund without husband's concurrence, 114; attachable by husband's creditors when greatly in excess, 115; not so when proceeding from a third party, 116; paraphernalia not under husband's power, 117; what included under paraphernal goods, 118; articles may be made so by being given to the wife before marriage by husband, 119; articles so given would lose this character by his death, 120; on death of wife, paraphernalia descend to her executors, *ib.*; wife's power over her heritage with husband's consent, 121; rights, how affected, when either *jus mariti* or right of administration excluded, 122; when both excluded, 123; effect of separation, voluntary or judicial, before 24 and 25 Vict., c. 86, 124; when husband insane, 125; ratification of deed by wife, 126; effect of same on wife challenging deed, 128; wife entitled to aliment pending action of separation or divorce, 129; not if she have a separate estate, 130; court has discretion of giving it and fixing its amount, *ib.*

*Separation, judicial and voluntary*—adherence a sacred duty, 131; two grounds of separation, cruelty and adultery, 132; what is personal violence, 133; threatening words, 134; lasciviousness falsely imputed, 135; what held as not cruelty, 136; habitual intoxication no ground for separation, 137; turning the wife out of doors is, *ib.*; desertion, *ib.*; husband may forbid visits from wife's friends, 138; may regulate her movements and pursuits, 138;



**Marriage—continued.**

his crimes are ground of separation, 139; disease no ground, 140, 141; nor insanity supervening on marriage, 141; defence of remissio injuriæ not pleadable though injured spouse cohabit after acts of cruelty, 142; adultery is a ground, 143; *judicial* separation competent to either spouse, 144; judgment in action of separation will not be pronounced on admissions by defender, 145; *judicial* separation takes away husband's power over person, 146; effects on patrimonial relations of spouses, 147; custody of children, 148; separation may be recalled by court, 149; or by mutual consent, 150; *lawburrows*, nature of, 151; different when used in case of third parties, 152; *voluntary separation*, 153; not enforced with regard to future, but regulates rights as regards past, 154; nature of the contract, 155; revocable by either spouse during marriage, *ib.*

*Donations between husband and wife*, not null but revocable, 156; between bride and bridegroom irrevocable, 157; also future donations, if marriage dissolved, 158; previous donations revoked by divorce of donee for adultery, *ib.*; in deeds, presumption for donation where no onerous cause of granting, 159; this presumption may be redargued by contrary proof, *ib.*; renunciation of *jus mariti* without onerous cause a donation revocable, 160; revocation may be tacit, 161; but not inferred from separation, *ib.*; predecease of donee does not effect a revocation, 162; no length of enjoyment by heir of heritage will exclude revocation, *ib.*; a third

**Marriage—continued.**

party acquiring from donee by a singular and onerous title protected from revocation, *ib.*; general conveyance does not infer revocation, 163.

*Dissolution of marriage—by death*, 165; survivor may marry, *ib.*; widow may be examined to see if she be pregnant, 166; widow's claim for aliment till first term, 167; mournings, 168; her claim for aliment has no preference, 169; not invalidated by having separate property, 170; rule as to marriage being dissolved within year and day altered, 171; surviving spouse entitled to certain provisions, 172; *terce*, what, 173; when held to be tacitly excluded, 174; lesser *terce*, 175; diminished by all real burdens, 176; when due, 177; not due from superiorities, mines and minerals, or patronages, 178; now due from burghage, *ib.*; due though marriage be dissolved within year and day, 179; *courtesy*, what, 180; does not emerge unless living child be born, 181; child must be mother's heir, *ib.*; what, if legitimated by subsequent marriage, 182; to what heritage does courtesy extend, 183; to what it does not extend, 184; what burdens husband liable for, 185; courtesy vests without service, 186; claim to, how barred, 187; *jus relictæ*, what, 188; division of moveables where children, 189; where no children, 190; not taken away by provision unless renounced, 191; not affected by husband's testament, 192; personal bonds bearing interest excluded, 193; wife cannot compete for it with creditors, 194; requires no confirmation, and pays no legacy duty, 195; wife's children by



**Marriage—continued.**

former marriage, 196; not affected by dissolution of marriage within year and day, 197; when wife predeceases, 198; not affected by 18 Vict., c. 28, 199; rights of wife when separated from husband under 24 and 25 Vict., c. 86, 200; *legitim*, 201.—*See* Parent and Child.

**Divorce**—two grounds, adultery and desertion, 202; Scotch law in accordance with that of the rest of Europe, 204.

**Adultery**—Divorce not introduced by statute, 205; competent whether committed by husband or wife, 206; not adultery if one spouse is constrained, 207; nor if intercourse has taken place by mistake, *ib.*; or entertains false belief of death, 208; only aggrieved spouse can pursue, 209; provisions of 24 and 25 Vict., c. 86, concerning action of divorce, 210; adultery may be abroad, 211; how summons served, *ib.*; divorce only granted by Court of Session, 212; jurisdiction of same, *ib.*; 213; action must not be raised collusively, 214; *oath of calumny*, 215; what is collusion, 216; in proof of adultery, marriage must be established, 217; presumptive evidence of adultery admitted, 218; what will warrant the conclusion that adultery has been committed, 219; divorce will not be granted if injured party has connived, 220; nor has been reconciled, 221; the strongest proof of remission, 222; recrimination no bar, 223; long delay, 224; what will not justify adultery, 225.

**Malicious desertion** a ground of divorce, 226; apostolic sanction of, *ib.*; grounded on statute, *ib.*; old form of action of adherence, 227; not now neces-

**Marriage—continued.**

sary, 228; desertion must be malicious, 229; how summons served when defender abroad, 230; when husband has acquired foreign domicile cannot sue for divorce if adultery committed abroad, 231; what defences are good, 232; wife bound to follow husband anywhere if required, 283; if she refuses, a good defence for husband in action of divorce for desertion, *ib.*

**Effects of divorce**—either spouse may marry again, 234; except adulterer and paramour, *ib.*; effects of divorce for desertion, 235; husband must return to her, 236; loses *jus mariti*, courtesy, and conventional provisions, *ib.*; where wife guilty, she loses legal and conventional provisions, *ib.*; innocent party continues entitled to legal provisions, 237; effects of either party's death before decree, 238; effects of divorce for adultery, 239; husband not bound to return to her, 240; donations between the parties, 241.

**Declarator of nullity of marriage**—marriage, however celebrated, declared null if legal impediments existed at time of contracting, 242; may be instituted by any one having patrimonial interest, 243; conclusion for damages, 244.

**Consistorial actions** must be before Court of Session, 241; decree cannot be pronounced in absence, 246; provisions of 24 and 25 Vict., c. 86, in regard to these, 246, 247.

**Marriage contracts**, 248; conditions must not be inconsistent with conjugal relations or public law, 250; *ante-nuptial contracts*—stipulations effectual against creditors, 252; *post-nuptial con-*

**Marriage—continued.**

*tracts*—stipulations not so effectual, 253; objects of such contracts to provide against husband's imprudence or misfortune, 255; how this effected, *ib.*; conventional arrangements must be express, 256; post-nuptial provisions of a reasonable amount valid if made during solvency, 256.

*Provisions to children*, 257; when good against creditors, *ib.*; must be reasonable, *ib.*; locality, what, 258; if accepted, excludes terce, *ib.*; jointure, what, 259; effects of different destinations, 260-2.

**MASTER AND SERVANT**—nature of contract, 530; who may be parties to, 531; pupils, minors, and married women, 532-34; how contract entered into, 535.

*Verbal contracts*—only lasts for one year, 536; requires to be implemented to be made effectual, 537; how completed, 538; how proved, 539; on whom proof rests, 540; agreement to reduce contract to writing, 541.

*Written contract*—when necessary, 542; stamp duty, 543; must be probative, 544; incompetent to refer to oath to supply solemnities, 545; but *rei interventus* allowed to be proved, *ib.*; earnest or arles, 546.

*Implied contract*—circumstances which constitute, 547; when one relative is servant to another, 548.

*Duration of contract*—no positive limit in point of time, 549; presumption as to duration when not expressly fixed, 550; domestic servants, presumed to be for six months, 551; engagement from month to month, *ib.*; rural servants, for a year, 552; overseers, managers, 553; tutors, governesses, and clerks,

**Master and servant—continued.**

554; managers of banks and editors of newspapers, 555; engagement during pleasure, 556; terms of entry, 557.

*Obligations of servant*—must enter service, 558; and continue in it, 559; if he does not, may be liable in damages, and in some cases imprisonment, *ib.*; may servant who deserts be imprisoned, 560-1; what servants cannot, 562.

**EXCEPTIONS TO THE OBLIGATIONS ON THE SERVANT TO ENTER AND CONTINUE IN THE SERVICE, OR ON THE MASTER TO RETAIN HIM.**

—Enlistment, 563; marriage of female servant, 564; *sickness* of servant, 565; where hurt received in master's service, entitled to full wages, 565; when master offers to maintain servant in his own house, not entitled to leave, 566; not entitled to wages after term of engagement, 567; if not brought on in master's service, wages due when it is of moderate duration, 568; no precise rule as to length, 569; if substitute required, his wages may be deducted, 570; when sickness caused by servant's misconduct, debauchery, or imprudence, wages only due for time served, 571; same rule when concealed from master, 572; what servants not entitled to claim wages for sickness, 573; insanity of servants, 575; imprisonment, 577; death of servant, 578; death of master, 579.

*General obligations after entry to service*—servant bound to exercise ordinary skill and assiduity, 580; skilled labour, 581; unusual assiduity, 582; in what cases this applies, 582-5; servant must be careful of master's property, 586; if not so, wages

**Master and servant—continued.**

may be deducted for damage, 587; negligence, 589; servant not liable for every damage he may occasion, 590; not liable if robbed of master's property, 591; may be dismissed if he rob his master, 592; *servant must be respectful*, 593; nature of respect incumbent, 594; *servant must be obedient*, 595; disobedience warrants dismissal, *ib.*; master not bound to assign reason for order, 596; disobedience if servant insists for reasons, *ib.*; master may control servant's hours, 597; cases where master entitled to dismiss for disobedience, 598-9; servant entitled to time to look out for another place, 600; extent of absence for this purpose, *ib.*; *Drunkenness*, one aggravated instance will justify dismissal, 601; *hours of labour*, where no special agreement, 603; domestic servants, 604; farm servants, clerks, and artisans, 605; *holy-days*, 606; servant not bound to work on Sunday, 607; *kind of work*, 608; servant must be willing to go beyond the precise line of his engagement in case of emergency, 609; servant not bound permanently to quit line of engagement, 610; not bound to work at a lower class of duties than those for which hired, 611; nor at different, *ib.*; servant of all work, 612; servants in husbandry, 613; *servant's conduct* must be decent, 614; if man servant debauches female servant, both may be dismissed, 615; not necessary to justify dismissal, that servant be with child, 616; improper conduct out of house will be ground of dismissal, 617; but not if prior to entering into service, 618; obscene or blasphemous

**Master and servant—continued.**

conversation ground of dismissal, 619; revealing family secrets a ground of dismissal, 620; or secrets in manufactures, 621; *servant's earnings* belong to master, 622; may solicit business for himself when he leaves, 623; inventions by a servant belong to him, 624; servant bound to accompany master, 625; what servants not bound to do so, *ib.*; servant not bound to go out of kingdom, 626; whether servant entitled to travelling expenses, 627; *admonition*, when requisite, 628; *wages due on dismissal*, rules as to, 629; fault must be mentioned at time to form a bar to wages, 630; *forcible ejection*, when justifiable, 631; on what terms master can dismiss servant at all times, 632.

**Obligations of the master**—bound to receive and allow servants to continue in service, 633; and to treat him without harshness, 634; *personal chastisement*, if competent, 634; *attempting the honour of a female servant* a good ground for her leaving, 635; *falsely accusing servant of dishonesty* also a good ground for leaving, 636; *food and lodging*—master must provide wholesome food and lodging, 637; may compel male servant to reside out of house, but not a female servant, 638; *medical attendance*, not liable for, 639; unless he interfere by calling surgeon, 640; or where illness has arisen from hurt sustained in his service, *ib.*; *when master liable for injuries sustained by servant*, 641; master liable if he conduct his business recklessly, 642; but positive misconduct must be brought home to him, 643; instances where

**Master and servant—continued.**

master not liable, 644; not liable for injury to servant caused by negligence of fellow-servant, 645; *liability of master for injury by a servant to a third party*, 647; what necessary to be proved, *ib.*; master liable if injury done in his employment, though he gave no express orders for the act, 648; but not liable for act which servant was specially ordered not to do, 649; not liable for damage from wrong wilfully committed by servant, 651; a superior not liable for tortious acts of inferior, if absent, 652; where crime committed with master's knowledge, both master and servant responsible, 653; *liability of master for contract by servant*—when master not liable, 654; *obligations to pay wages or hire*—presumption is, that service for wages, 655; when servant entitled to increase over sum specified, 656; *interest on arrears*, servant entitled to, as long as wages unpaid, 657; *deductions for damage by servant*—no deduction allowed unless conduct was culpable, 658; none for breakages, *ib.*; when master's plea of misconduct in bar of wages not allowed, 659; *payments and presents to servants during the engagement*—these not allowed to be deducted from wages, 660; *hiring by an overseer or other agent*—if agent capable of contracting for principal, master liable, 661; *when wages must be paid*—in case of domestic servants, payable half-yearly, 662; in other servants, regulated by custom, *ib.*; *clothes and livery*—master not bound to supply these, 663; if he does, they remain his property, *ib.*; *servant's lien for his wages*—

**Master and servant—continued.**

tradesman may retain materials till payment be made him of expense disbursed and value of workmanship, 664; servant cannot do so, 1425; *arrestment of wages*—not arrestable in so far as alimentary, 665; but excess and arrears may, *ib.*; what cases this rule held to be applied to, *ib.*; *prescription of wages*—prescribe in three years, 666; the Act applies to servants of all kinds, 667; each term's wages prescribe, 668; pleadable after master's death, 669; *death of master and servant*—if servant dies, wages due for time he has served, 670; if master, full wages due, *ib.*; *competition between servants and creditors*—servant's wages a privileged debt, 671; to what servants this applies, *ib.*; *giving a character*—master not bound to do so, 672; if given, must be true, 673; if false, will be liable in damages, 674; may be liable in damages for giving false character in servant's favour, 675; *assignation of servant to new master*—master cannot voluntarily do so, 676; where master assumes a partner, he cannot give him the rights of a master over domestic servants, *ib.*; case of artisans different, 677; servants of a company not freed though original partners' go out, 678; but one company cannot assign a servant to another, *ib.*; when servants will be bound to transfer their services, *ib.*; *termination of contract by master's death or bankruptcy*—damages due for breach of contract in these cases, 679; wages will be given till next term, *ib.*; *servant not bound to return to service if improperly dismissed*, 680; *damages for enticing servant to leave*—

*Master and servant—continued.*

master entitled to these from third parties, 681.

*Termination of contract*, 682; *warning*—if none given, a renewal of contract presumed, 682; no formal style necessary, 683; what time is necessary, 684; servant entitled to time to look out for new place, 685; *old and new style*, 686; *servant's obligations to depart and deliver up property*, 687; after dismissal, master may expel servant from house, *ib.*; servant bound to leave all houses held qua servant, 688; and to deliver up all property of master in his possession, *ib.*

*Statute law relative to contract of service*, 689; prior statutes suspended by 4 Geo. IV., c. 34, *ib.*; provisions of this statute, 690; extended by 10 Geo. IV., c. 52, 691; misconduct or misdemeanour, what, *ib.*; statutes apply to apprentices, *ib.*; workman must give a fair day's work, 692; statutes do not refer to menial or domestic servants, 694; whether contract must be in writing, 695; *complaints of servant against master*—provisions of 20 Geo. II., c. 19, 696; whether this Act extends to Scotland, *ib.*; *wages must be paid in current coin*—provisions of 1 and 2 Will. IV., c. 36 and 37, in regard to, 697-8; statutes do not refer to domestic or farm servants, 699; exceptions to these enactments, 700; *arbitration between master and workman*, 701; what disputes subject to, *ib.*; mode in which carried through, *ib.*; statutes on this subject, 704; *restrictions on the employment of women and children in factories*, 705; statutes relating to, *ib.*; *combinations among workmen*, 706; declared illegal

*Master and servant—continued.*

by 6 Geo. IV., c. 129, *ib.*; but only where breach of contract or violence is contemplated, *ib.*

*Seamen*—statutes relating to, 707; provisions of *Merchant Shipping Act*, 17 and 18 Vict., c. 104, sec. 708-715; want of provisions will justify seaman in leaving ship, 716; also cruelty, 717; not desertion, if seaman enters royal navy, 718; if a woman does the work, she is entitled to wages of a mariner, 719.

MASTER AND APPRENTICE, 720; what contract implies, *ib.*; may be gratuitous or for a consideration, *ib.*

*Origin and nature of contract*, 722; exclusive privileges of burghs abolished by 9 Viet., c. 17; 723; contract must be written and probative, 724; is termed indenture, *ib.*; form of, 725; *who may enter into an indenture*, 726; pupils do so by guardians, *ib.*; minors may by themselves, if they have no curators, *ib.*; where minor has deceived master, 727; pupil or minor may be restored on proving lesion, 728; *contract must be in writing*, 729; actual service will complete an informal written contract, *ib.*; but will not supply the absence of writing, *ib.*; *stamp*—indenture must be stamped, 730; indenture void if apprentice fee not accurately set forth, *ib.*; those to sea service and of pauper children exempt, 731; duty is 2s. 6d., 732; after stamping, 733.

*Obligations of master and apprentice*—societies having peculiar arrangements, court will give effect to, 734; apprentice cannot be called upon to perform menial duties, 735; master's personal attendance not always required, 737; can master transfer apprentice, 738; by common

**Master and apprentice—continued.**

law, apprentice cannot enlist, 739; this modified by Mutiny Act, *ib.*; provisions of, *ib.* to 741; master entitled to earnings of apprentice, 742; when apprentice may be dismissed, 743.

**Dissolution of the contract**—by consent, 745; by death, *ib.*; executors of master may retain part of apprentice fee, 746; if apprentice dies, whole fee remains with master, 747; insanity of either party terminates contract, 748; master's bankruptcy, 749; apprentice may rank for premium, *ib.*; marriage of male apprentice does not terminate contract, 750; female's does, *ib.*; how contract may be otherwise dissolved, 751; where indenture with a company, 752; *cautioners of apprentice*, 753; they have the benefit of division, 754; but not of discussion, *ib.*; defences valid to apprentice competent to cautioner, 755; cautioner has action of relief against apprentice, 756; *statutory provisions*, 757.—*See* Master and Servant—statute law.

**Means and substance**, how assessed for poor, 1938.—*See* Poor.

**Memorandum of association**, 1642.—*See* Partnership.

**Measures, weights and**, 1099.—*See* Sale.

**Medical attendance**, 639—*see* Master and Servant; poor, 1902; a preferable debt, 1012.

**Meditatio fugæ warrant**, 2094.

**Mercantile Law Amendment Act**, 1132, 1140.

**Mercantile law of Scotland** resembles that of England, 3.

**Mercantile law of Scotland**, history of the cultivation and study of, 1050.

**Mercantile writings** exempted from the usual solemnities, 1506.

**Merchants' accounts**, triennial prescription of, 1298.

**Messengers-at-arms**, 2111; *cautioners* for, 1724.

**Middlemen**, 1145.

**Mill**, 1259.—*See* Thirlage.

**Mines and minerals**, 1331.

**Ministers**, 2123 *et seq.*—*see* Courts, Ecclesiastical; stipend of, 1260.

**Ministers' Widows' Fund**, debts due to, privilege of, 1261–1263.

**Minors**, 325.—*See* Guardianship.

**Minute of sale**, 1204.

**Misrepresentation in insurance**, 1749.

**Models**, copyright in, 1817.

**Moderator for Assembly**, 2153.—*See* Courts, Ecclesiastical.

**Montgomerie Act**, 850.

**Mortgage on ships**, 1162.

**Mother**, 263 *et seq.*—*See* Parent and Child.

**Mourning**s, 168.

**Moveable property**, how distinguished from heritage, 758.

**Moveable succession**, 951—*see* Succession; testate, 963; intestate, 951.

**Moveables**, heirship, 763. }

**Moveables**, sale of, 1075.

**Music**, copyright in, 1815.

**Name**, change of, view of law regarding, 2118 *et seq.*—*See* Lord Lyon.

**Natural children**, 309.—*See* Bastards.

**Nautæ caupones stabularii**, edict regarding, 1412.

**Navigable rivers**, 1222.

**Navigation laws**, 707.

**Negligence**, master liable for servant's, 647.

**Negative prescription**, 1279.

**Notary**, 2191; function of, *ib.*; how admitted, 2192.

**Notes**, promissory, and bills, 1517.—*See* Bill.

**Notice of dishonour of bill**, 1571.

**Notice of dissolution of partnership**, 1611.

Noting of protested bill, 1568.

Nullity of marriage, declarator of, 245.

Oath of calumny, 215.

Oath in litem, 1412.

Obligation, cautionary, 1684.—*See* Cautionary.

Offer, acceptance and, may constitute a lease, 1313.

Offerers, 1199.—*See* Sale by Auction.

Oneris ferendi, servitude of, 1255.

Overseers and managers, hiring of, 553.

Overtures to General Assembly, 2154.

Owners of ships, responsibility of, 1409.

Owner and occupants, mode of assessing, under Poor Law, 1938.

Oysters, jurisdiction of Magistrates of Edinburgh with reference to dredging, 2072.

Paraphernalia, 117.—*See* Marriage.

*Parent and child*, 263; legitimacy, what, *ib.*; arises from various sources, 264; presumptions for and against, 266; presumption invalidated by proof that father was impotent or absent, 277.

*Period of gestation*, 268; putative marriage, 269; children conceived after impediment known are illegitimate, 270; children born from rape on a woman, whether legitimate, 271; bastards, how legitimated, 272; *legitimation by subsequent marriage*, 273; effects of, 275; by letters from the sovereign, 277; bastards can test, 278; international questions, 279; domicile of father regulates moveable succession, 280; situation of the property regulates heritage, 281.

*Paternal power*, 282; greatest in rudest societies, *ib.*; ceases at puberty, *ib.*; custody of child belongs to father, 283; may chastise child and compel it

*Parent and child*—continued.

to work, 284; powers do not terminate after divorce, 285; terminates with marriage of daughter, 286; court may control paternal power, 287; is it forfeited by refusal to aliment or educate, 288; father differs from tutor in this respect, *ib.*; he is absolute judge of education suitable for child, *ib.*; can he be compelled to apprentice child to a trade, *ib.*; father's powers do not belong to mother in case of legitimate children, 289; but she is preferred to the custody of illegitimate children, *ib.*

*Duty of father to aliment child*—refusal to aliment is a crime punishable under Poor Law Statute, 290; when childhood past, this duty is transferred to children, 291; order of liability of relations to aliment each other, 292, 293; amount legally due, 294; separate aliment will be decreed to child only when parent has maltreated him, 295; different in regard to ascendants, 296; child may contract for necessities, 297; father not liable for child's crimes, 298; if a child earns as much as will support him, father not bound to aliment him, 299; where child educated to a profession, father bound to maintain him till he receives employment, 300; where child is not trained to a profession, 301; where child has separate fortune, 302; daughters in the higher ranks must be alimented till marriage, in the lower till they are fit for service, 303; married daughters, 304; a daughter is bound to aliment her mother, 305; obligation to aliment not affected by extravagance, and cannot be removed



*Parent and child—continued.*

by compact, 306; obligations of heir, 307; child's duty of reverence and obedience, 308; *bastards*, both parents liable for, 309; future aliment forms a debt against deceased father's estate, 310; failing parents, burden falls on mother's parish, 311; strangers alimentering have relief against parents and parochial board, 312; right to arrears not cut off by prescription, 313; amount of aliment, 314; duration of, 315; mother's claim for inlying charges, 316; custody belongs to mother, 317; where father may claim custody, *ib.*; general rule as to custody of infants, 318; mother liable to aliment her indigent child, 319; stepmother not liable to aliment stepson, *ib.*; protection and guardianship of infants belongs to Court of Session, 320; former rule as to degree of evidence to raise presumption of paternity, 321; amount of evidence requisite to admit oath in supplement, 322; now competent in all actions, *ib.*; evidence of mother liable to same test as other witnesses, 323; is the oath in supplement still competent, *ib.*; children are the natural heirs of parents, 324.

Partial loss or injury, 1764.—*See Insurance.*

**PARTNERSHIP**, 1584; origin and object of contract, *ib.*; *partnership proper*, 1586; avowed and anonymous partnership, 1587; general or special partnership, 1588; implied mandate, 1589; fraud renders company liable in reparation, *ib.*; effect of limitation of power of signing firm, 1590; joint responsibility, 1591; how company sued, *ib.*; firm may hold lease, 1592; delectus personæ implied in partnership,

*Partnership—continued.*

1593; heirs, assignees, and creditors excluded, *ib.*; even where their adoption stipulated, partners may object, 1594; *constitution of contract of partnership*, 1595; how proof of existence may be established, *ib.*; presumption for equality of shares where no stipulation, 1596; one person cannot make a partnership, 1597; one company may be a partner of another, *ib.*; a partner may share profits without sharing loss, 1598; duties of partners, 1599; *duration and dissolution*, 1600; if no term be fixed, it will be dissolved at will of parties, 1601; withdrawal of one partner dissolves, 1602; renewal by tacit consent, *ib.*; notice of intention to withdraw not requisite, 1603; court will, if necessary, appoint a neutral person to wind up affairs, 1604; death of partner dissolves contract, 1605; insolvency does not dissolve, 1606; sequestration does, *ib.*; incapacity and misconduct, 1607; marriage of female partner, 1608; change of partners, 1609; dissolution in relation to third parties, 1610; notice requisite, 1611; to customers, 1613; a gazette notice alone not sufficient, 1614; to strangers, 1615; notice of death, 1617; winding up, 1618; *accounting*, rules of, 1620—1; in case of retirement, interests of parties regulated [by preceding balance, 1622; diligence against a bankrupt company, 1623; trust deed and sequestration, 1624—*see Bankruptcy*; *joint trade*, 1628; *joint ownership*, 1629.

*Joint-stock companies*, 1630; distinctions between, and partnership, *ib.*; former law of Scotland regarding joint-stock companies



*Partnership*—continued.

same as that of France, 1631; Arran fishing, case of, *ib.*; Bubble Act, *ib.*; principle of common law of Scotland abandoned, 1632; Douglas Bank case, 1632; English doctrines introduced, *ib.*; unlimited liability unless company limited, 1638; limited liability not at first extended to banking and insurance companies, 1634; restriction now removed as to banks, *ib.*; but not as regards insurance offices, 1635; Bank of Scotland's special Act limits liability, 1636; royal charter, 1637; questions as to its effects, *ib.*; none of chartered banks do possess the privilege in point of fact, 1638; powers of Crown in charter, 1639; private joint-stock banks, 1640; name of firm, and names of members and managers, must be registered, *ib.*; *Joint-Stock Companies Act*—its provisions, 1641; seven or more persons may form a company incorporated under Act, 1642; more than twenty persons trading without registration liable to penalties, 1643; memorandum 1644; limited must be last word in name of company, 1645; Board of Trade may appoint registrars, 1648; provisions as to existing companies, 1650; provisions as to certificate of registration and meetings, etc., 1651 *et seq.*; quorum of shareholders, 1661; votes of shareholders, 1663; directors, 1664; calls, 1666; dividends, 1667; accounts, 1670; winding up, 1673; winding up by the court, 1674; official liquidators, 1675; dissolution, 1676; voluntary winding up, 1677; criminal prosecution of directors, 1679; liability of former shareholders, 1682.

Passage, servitude of, 1242.

Pasturage, servitude of, 1245.

Passengers Act, 18 and 19 Vict., c. 119, 707.

*Patents*, 1830; power of granting, royal prerogative, 1831; history of patent law, 1832; Patent Law Amendment Act, its provisions, 1835–44; foreign inventions, 1845; actions for infringement of letters patent, 1850; subsequent statutes relating to patents, 1851; schedule of stamp duties appended to statute of 1853, *ib.*; a principle cannot be patented, 1852; letters patent are moveable, 1854; simultaneous invention, 1855; aid in invention, 1856; letters patent may be taken in name of two or three persons, *ib.*

Paternity, 263 *et seq.*—*See* Parent and Child.

Patterns, 1829.—*See* Copyright.

Pawnbroking, 1436.—*See* Pledge and Lien.

Peace, justices of, 2075; clerk of the, 2110.

Peers originally appointed to sit with Judges of Session, 1947; amenable to Court of Justiciary in ordinary crimes, 2030; for treason or felony are tried by Court of Lord High Steward, *ib.*; House of, 2013.

Penalty, effect of clause in a bond, 1861.

Perils of the sea, 1409–1743.

*Personæ delectus* implied in partnership, 1593.

Personal, 758 *et seq.*—*See* Moveable.

Petty sessions, when called, 2084.

Pigeons, tenant not entitled to kill tame, may scare them away, 1341.

Planting, statute for preserving, 1333.

PLEDGE AND LIEN, what, 1423; distinction between, 1424; objects over which lien exists, *ib.*; lien for remuneration of labour, 1425; difference between hypothec and pledge or lien, 1426; occasions on which pledge is used, 1427; pledge, how employed by Go-

vernment, 1429; provisions of latest Warehousing Act, 8 and 9 Vict., c. 91, 1430-5; *pawnbroking*, history of, 1436; statutory requirements, 1437-8; who pawnbrokers under recent Act, 1440; penalties recoverable from, 1441; before what magistrates recoverable, 1442.

Poining of the ground, 1878.

Police Court of Sheriff, 2068; of magistrates in burghs, 2070.

Policy in marine insurance, 1744; in fire insurance, 1774.—*See Insurance.*

POOR, 1880; their former condition in Scotland, 1881; earlier statute law, 1882; begging permitted, and beggars furnished with tokens, *ib.*; statute which forms the basis of present law passed after Accession, 1883; vagabond scholars of the universities not licensed to beg included in penalties, *ib.*; assessment imposed, *ib.*; not actually enforced for upwards of a century, *ib.*; management of poor transferred from magistrates of burghs and justices to kirk-session and heritors, 1884; settlement, residential, of three years introduced in Chas. II.'s time, *ib.*; continued till 1845, *ib.*; proclamations of Privy Council, 1858; provisions of the earlier statutes and proclamations, partly penal and partly eleemosynary, 1886; former in desuetude, *ib.*; latter, where unaffected by recent statute, still in force, *ib.*

*Poor Law Act*, 8 and 9 Vict., c. 83, 1886; provisions of, 1887 *et seq.*; Board of Supervision, 1888; Parochial Board, 1889; their respective powers, 1890; settlement, period necessary to acquire, extended to five years, 1891; how lost, *ib.*; removal of English and Irish paupers, 1892; prosecution of husbands

*Poor*—continued.

deserting wives, 1893; interim maintenances, right to claim introduced, 1894; union of parishes, 1895; inspector, 1896; dissolution of combinations of parishes, 1897; manuals on poor law, 1898.

*Relief*—application for, 1899; interim relief, 1900; if relief refused, pauper may go to Sheriff, 1901; medical attendance and education, 1902; persons entitled to relief, 1903-7; Lunacy Act, its provisions with reference to licenses for reception of pauper lunatics in poorhouses, 1908; foreigners entitled to relief, 1909; cannot be compulsorily removed, *ib.*; *occasional relief*, 1910; former practice, *ib.*; may now be claimed as a right, 1911; able-bodied persons out of employment not entitled, 1912; when pauper possessed of property, 1913; relatives bound to relieve, 1914; bastards, 1923.

*Settlement*, general rules as to law of, 1925; funds for supplying relief, 1930; *church door collections*, 1933; provision of poor law statute as to, 1934; *assessment*, 1937; provision of poor law statute as to, *ib.*; of subsequent statutes, 1940; superintendents under poor law, 1942.

Poor, litigation by, 2207.

Ports and harbours, 1225.

Positive prescription, 1282.

Post-nuptial contract, 253. — *See Marriage.*

Præcipium, 796.

Prædial servitudes, 1238.

Preferable or privileged debts, 1012.

Premium, 1737.—*See Insurance.*

Presbytery, 2132.—*See Courts, Ecclesiastical.*

*Prescription*, 1277; prescription and limitation distinguished, *ib.*; positive and negative prescription,

- 1278; *forty years' prescription*, 1279; statutes relating to, *ib.*; to what it extends, 1280; no statutes required to establish a positive prescription in moveables, 1281; positive prescription to secure heritage introduced by 1617, c. 12, 1282; how long possession must be proved, 1283; interruption of these prescriptions, 1284; can only be by the person against whose claim it is running, 1285; in what cases it is suspended, *ib.*; citations must be renewed every seven years, 1286; *of the lesser prescriptions*, 1287; vicennial prescription, 1288; holograph writings, 1289; of crimes, 1290; decennial prescription, 1291; applies to accounts between tutors and curators, *ib.*; provisions of Pupils Protection Act with reference to, *ib.*; septennial prescription, 1292; cautionary obligations, *ib.*; sexennial prescription, 1293; applies to bills and notes, *ib.*; bank notes excepted, 1294; minority of creditors to be deducted, 1295; quinquennial prescription, 1296-7; triennial prescription, 1298; to what it applies, 1298-9; from what time prescription runs, 1300; resting owing, how proved, *ib.*; applies to actions of spulzie, ejectment, and removing, 1302; and for wrongous imprisonment, 1303; and for high treason, 1304; and to arrestments, 1305.
- Prescription**, long, introduced by stat. 1469, c. 28, 7, 1279.
- Prescription in cautionary**, 1706.
- Presents to servants**, 660.
- Presentation, bond of**, 1730.
- Presentment**, 1559 *et seq.*—*See Bill.*
- Price**, 1070 *et seq.*—*See Sale.*
- Primogeniture**, 792.
- Principal and agent**—*see Procuration*, 1523; partnership, 1586; implied mandate, 1589; middlemen and hands of the buyer, 1087; consignment, 1129, 1435. hiring of servants by agents, 661.
- Princes, capture and arrest by**, 1765. —*See Insurance.*
- Privileged debts**, 1012.
- Proceedings, judicial**, 2196; forms of process, not subject suited for popular treatment, *ib.*; limits within which it may be treated, 2197; civil actions, 2198; Small Debt Court, 2199; mode of raising action in, *ib.*; witnesses, rule as to citing, 2202; must be present at first calling, 2204; agents generally admitted if services required, 2205; ordinary actions, 2206; every man may plead his own cause, *ib.*; privilege rarely exercised, *ib.*; imprudence of exercising it, *ib.*
- Procuracion, subscription of bills and notes by**, 1523; indorsation, 1539.
- Procurator-fiscal**, 2209.
- Procurator of church**, 2153.
- Profits in partnership**, 1596.—*See Partnership.*
- Promise of marriage**, 19 *et seq.*—*See Marriage.*
- Promissory notes and bills**, 1517.
- Proof.**—*See Evidence*, 265.
- Property, rights and burdens attaching to heritable**, 1208; *public burdens*, *ib.*; *public roads and highways*, 1209; history of statute law regarding, 1211; General Road Act, *ib.*; a highway must be twenty feet broad, 1212; jurisdiction under Road Act, 1213; right of way, 1214; jurisdiction of Sheriff and Court of Session in questions of right of way, 1215; *sea shore*, 1216; what it includes, *ib.*; grants of, 1217; "parts and pertinents" include shell, sand, etc., 1220; but salmon fishings require express grant, 1221; *navigable rivers*, 1222; *the sea*, 1223; convention between England and France regarding fisheries,

**Property—continued.**

- 1224 ; *ports and harbours*, 1225 ; must be kept up as far as dues afford, 1226.
- Railways*, 1227.—*See Railways.*
- Servitudes*, 1236.—*See Servitudes.*
- Stipend*, 1260 ; vacant stipends, 1261 ; rule as to, 1262 ; rates payable to ministers' widows' fund privileged debts, 1263 ; *the church*, 1264 ; presbytery, powers with reference to, 1265 ; accommodation to be provided, 1266 ; *the manse*, 1267 ; *the glebe*, 1268 ; where no church lands, 1269 ; incumbent's powers over, 1270 ; *schoolmaster*, 1272 ; amount of salary, 1273 ; *pigeon-houses*, 1274 ; tenant not allowed to shoot landlord's pigeons, 1275 ; *game*, 1276.
- Propinquity, degrees of, 782 *et seq.* ; in which marriage prohibited, 40.
- Protest of bill, 1568.
- Pro-tutors and pro-curators, 456.
- Provisions by heirs of entail to widows and children, 851.
- Publicans, licenses to, 2100 ; their responsibilities to public, 1412.
- Public prosecutor, institution of, derived from France, 3.
- Public roup, 1199.—*See Sale by Auction.*
- Public property, 1208 *et seq.*
- Pupils Protection Act, 368, 1291.  
—*See Guardian, Parent and Child.*
- Pupillarity, when it ceases, 16.
- Pursuivants, 2111.—*See Lord Lyon.*
- Quakers, registration of their marriages, 27.
- Quarter session, 2076 ; days of holding, 2083.
- Quinquennial prescription, 1296.
- Quorum of justices, 2086 ; of trustees, 1032.
- Rabbits not game, 1339.
- Railways*, 1227 ; central control over, vested in Board of Trade, 1228 ; property held under condition of being surrendered for railway purposes, 1229 ; cheap trains, 1232-5.
- Ranking, 1493.—*See Bankruptcy.*
- Ratification of deed by wife, 47, 126, 2090.
- Re mercatoria, writings in, 1506.
- Recourse on bills, how preserved, 1528-1571.
- Recrimination no bar to divorce for adultery, 223.
- Reduction ex capite lecti, 916.—*See Succession.*
- Registration of regular marriages, 27 ; of irregular and clandestine, 35.
- Registration of ships, 1155.
- Regular marriages, 23.
- Rei interventus, 1063.
- Rejection of goods by buyer on his failure, 1150.
- Relationship, impediments to marriage by, 40.
- Relatives, what, bound to relieve under poor law, 1914.
- Relief among cautioners, 1699.
- Relief, casualty of, 1176.
- Removing, 1362 ; in houses, 1382.
- Removing fixtures, 1351.
- Removing, actions of, prescribe in three years, 1302.
- Rent, 1349 *et seq.*—*See Letting and Hiring.*
- Rents, prescription of, 1298.
- Repairs in letting of urban subjects, 1374.
- Representation in succession to heritage, 799 ; to moveables, 952.
- Reserved rights of the Crown, 1208 *et seq.*
- Resignation ad remanentiam, 1186.
- Responsibility of master for servant, 647 ; of shipmasters, innkeepers, and stablers, 1412.
- Restitution of minors, 412, 447.
- Retention of rent, 1368.
- Retours, 938 ; prescription of, 1288.
- Return, clause of, 835.
- Reviews, copyright in, 1814.

Rights and burdens attaching to heritable property, 1208.

Right of way, 1214.

Risk in contract of sale, 1078 *et seq.*

Rivers, navigable, 1222.

Road, public, or highway, 1209 ; servitude of, 1243.

Rooming and souming, action of, 1247.

Rosebery Act, 890.—*See* Entail.

Roup or auction, 1199.—*See* Sale by Auction.

Ruinous houses, 2073.

Rural servitudes, 1241.

Rutherford Act, 854.—*See* Entail.

Sabbath, contracts made on, are good, 1067.

**SALE**—of the contract of, 1070 ; when price to be paid in foreign coin, 1071 ; there must be a price, 1072 ; things not yet in existence may be sold, 1073 ; writing, when necessary and when not, 1074.

*Sale of moveables*—delivery, 1075 ; provision of Mercantile Law Amendment Act as to, *ib.* ; rules as to transference and risk, 1078–84 ; delivery, actual and constructive, 1085 ; actual delivery, in what ways effected, 1086–91 ; constructive delivery, how effected, 1093–5 ; failure to deliver, 1096 ; *implied conditions in sale*, 1097 ; usage of trade, *ib.* ; local usage, 1098 ; weights and measures, 1099 ; provisions of 5 and 6 Will. IV., c. 63, as to, 1100–11 ; if order given for several articles, whole must be sent, 1112 ; when buyer has seen and examined goods, 1113 ; fraud, if seller knew and concealed a material latent defect, 1114 ; “puffing,” 1115 ; when goods sold by sample, 1116 ; when no sample exhibited, 1117 ; buyer must make challenge immediately, 1118 ; solvency of buyer, 1119 ;

*Sale*—continued.

*express conditions of sale*, 1120 ; ready money, 1121 ; rules where bills to be given, 1122–6 ; when goods sold on arrival of a certain ship, 1127 ; where delivery to be on arrival not beyond a certain day, 1128 ; *sale and return*, 1129 ; *special warranties*, 1130 ; provision of Mercantile Law Amendment Act as to, 1132 ; *warranty of horses*, 1133 ; *payment* must be in cash if insisted on, 1134 ; buyer not discharged if his bill be dishonoured, 1135 ; will be if bank notes taken though bank fail, 1136 ; if seller agree to receive bill on third party, buyer is discharged, 1137 ; buyer liable in damages if he refuse to take delivery, 1138.

*Stoppage in transitu and retention of goods by seller*, 1139 ; the right of stoppage originated in a decision of House of Lords, *ib.* ; doctrine which it superseded, *ib.* ; right of stopping exists only in seller, 1140 ; provisions of Mercantile Law Amendment Act as to, 1140–2 ; landlord's right of hypothec and sequestration saved from operation of, 1143 ; payment of part of price does not take away right to stop, 1144 ; nor delivery of a part, *ib.* ; insolvency sufficient to justify stopping delivery, *ib.* ; goods delivered to persons acting as hands of buyer cannot be stopped, *ib.* ; who are middlemen, 1145 ; middleman may become agent of buyer, 1146 ; cases in which transit is at an end, 1148 ; bills of lading, rules regarding, 1149 ; bankrupt in Scotland not entitled to take delivery, 1150 ; modes of stopping, 1151 ; physical possession of goods by buyer will not prevent stoppage,

*Sale*—continued.

1152; when goods delivered by mistake, restitution may be obtained, 1153.

*Sale of ships*—regulated by Merchant Shipping Act of 1854, 1154; all British ships, except certain small craft, must be registered, 1155; registrars in and beyond United Kingdom, 1156; transference of ships, 1159; mortgages on, 1162; transference of, 1163.

*Sale of heritage*, 1164; must be in writing, 1165; minutes and missives of sale, *ib.*; *constitution and transmission of heritable rights*, 1166; regulated by feudal system, *ib.*; constitution of feudal rights, 1168; superior and vassal, *ib.*; the sovereign the universal superior, 1169; subinfeudation in Scotland and England, *ib.*; feu charter and disposition, 1170; superiority, or dominium directum, and property, or dominium utile, 1171; military tenure, 1172; taxed ward, *ib.*; military tenures abolished in Scotland, 1173; blench holding, 1174; feu holding, 1175; casualties of superiority, 1176; *transmission of heritable rights*, 1177; recent legislation on the subject—note, *ib.*; instruments of conveyances, charters, dispositions, bonds, etc., 1178; ceremony of infeftment no longer required, 1180; principle of recording deed introduced by 8 and 9 Vict., c. 31, 1181; this principle now extended to conveyances of land, 1182; old forms may still be used, *ib.*; warrant of registration, 1183; notarial instrument, 1184; clause of direction, 1185; instruments of resignation ad remanentiam dispensed with, 1186; not necessary to insert an obligation to infeft on pre-

*Sale*—continued.

cept of sasine, 1187; charters of confirmation superseded by writs, 1188; same provision as to charters of resignation, 1189; if charters retained, sufficient to refer to tenendas and reddendo clauses, 1191; writ of clare constat, 1192; assignation of an unrecorded conveyance, 1194; repetitions in conveyances dispensed with, 1195; extinction of mid superiorities, 1196; actions of constitution and adjudication against apparent heir, 1197.

*Sale by auction*, 1199; articles of roup, 1200; clauses of, 1201; implied conditions in auction, 1205; upset price, 1206; conditions in articles of roup cannot be controlled by verbal declaration of auctioneer, 1207.

Salmon fishings, 1221.

Sample, sale by, 1116.

Sasine, 1180.—*See* Sale of Heritage.

Scholars of Universities not licensed to beg, subject to penalties under poor law statutes, 1883.

Schools and schoolmasters, 1272.

Sculpture, copyright in, 1817.

Seaworthiness in marine insurance, what it includes, 1754.

Sea-shore, 1216. — *See* Property, rights and burdens attaching to.

Sea-ware, right of tenant to take, 1335.

Seamen, statute law relating to, 707.

Seats in churches, number to be provided in building church, 1266.

Secrets, servant must not reveal, 620.

*Securities for debt*, 1858; personal bond, *ib.*; when necessary, *ib.*; form of, 1859; when heritable and moveable, 1860; penalty in, how construed, 1861; contains clause of registration for execution, 1862; rate of interest payable on, 1864–5; legal interest still 5 per cent., 1866; *heritable*

- bond*, 1867; form of, 1868; bond and disposition in security, 1870; absolute disposition with back bond, 1871; *inhibition*, 1875; how executed, 1876; strictly personal, 1877; provisions of Bankrupt Act with reference to, *ib.*; modes of rendering securities effectual, 1878; poinding of the ground, *ib.*; actions of maills and duties, *ib.*; provisions of Bankrupt Act with reference to these diligences, 1879.
- Servitude*, 1236; personal, 1237; prædial or real, 1238; division of real servitudes, 1240; *rural servitudes*, 1242; road or passage, 1243; distinction between servitude and public roads, *ib.*; servient proprietor not bound to maintain road, 1244; pasturage, 1245; how regulated, 1246; action of souming and rooming, 1247; feal and divot, 1248; fuel, 1249; aqueduct, 1251; dominant proprietor not bound to repair injuries by floods, 1252; watering of cattle, 1253; *urban servitudes*, 1254; support, 1255; stillicide and fluminis, 1256; light or prospect, 1257; *altius non tollendi*, 1258; thirlage, 1259.
- Session, Court of, 1945.—*See Courts.*
- Sets of bills, 1510; of bills of lading, 1407.
- Settlement, 1891; general rules as to law of, 1925.—*See Poor.*
- Sexennial prescription of bills, 1293, 1581.
- Sexual intercourse, 20.—*See Marriage.*
- Sheriff, history of office of, 2039.
- Sheriff-depute and Sheriff-substitute, 2045 *et seq.*
- Sheriff Court, 2039 *et seq.*—*See Court.*
- Sheriff, his powers under Poor Law Act, 1901.
- Shipmasters, liabilities of, 1412.
- Ships, sale of, 1154; hiring of, 1394.—*See Sale, and Letting and Hiring.*
- Shooting, 1336.—*See Game.*
- Shop accounts, prescription of, 1298.
- Shops, renting of, 1369.—*See Letting and Hiring.*
- Shore, sea, 1216.
- Sickness of servant, 565, 639.—*See Master and Servant, also Medical Attendance.*
- Sick, when entitled to relief under poor law, 1910.
- Sight, bills payable at, when presented, 1561.
- Signet, writers to, 2173.—*See Writers.*
- Sister, marriage with deceased wife's, 43.
- Slip preceding policy of insurance, 1745.
- Small Debt Courts of Sheriff, 2060; of justices, 2103; cases of prescription of shop accounts occur in, 1301.
- Societe in commandite, its nature, 1584.
- Society or partnership, 1584.—*See Partnership.*
- Solicitor - General prosecutes in Court of Justiciary, 2024.
- Solicitors (*see Writers to the Signet*), 2173; solicitors before supreme courts, 2183; discharge functions entrusted to writers to the signet, with some exceptions, *ib.*; mode of admission, 2184; fees of, 2185.
- Solicitors-at-law, 2187; their practice confined to inferior courts in Edinburgh.—*See Writers.*
- Solvency an implied condition in sale, 1119.
- Souming and rooming, action of, 1247.
- Special service, 929.
- Spoilzie and ejectment, actions of, prescribe in three years, 1302.
- Sponsalia, 19.
- Stablers, liabilities of, 1412.
- Stair, Lord, his opinion regarding marriage, 12.
- Stamp on bills and promissory notes, 1551.
- Stationers' Hall, 1804; register at, 1808.—*See Copyright.*



Statute law of Scotland, two portions of, 4; earliest statute now in force, 6; Scotch statutes may be repealed by desuetude, 7.

Steward, Lord High, his court for the trial of peers, 2030.

Stillicide, servitude of, 1256.

Stipend, 1260; prescription of, 1296.

Stock of a company, 1586.—*See* Partnership.

Stolen bills, 1579.

Stoppage in transitu, 1139.—*See* Sale.

Subletting of land, 1345; of houses and shops, 1372.—*See* Letting and Hiring.

Subscription of deeds, 978 *et seq.*

Subscription of bills, 1523.

Subsequent marriage, legitimation by, 273.

Substitute, Sheriff, his appointment and duties, 2045.

Substitutions in succession, 823.

Substitutions in legacies, 997.

Sub-tenants, 1347.

**SUCCESSION, HERITABLE AND MOVEABLE.**—*Distinction between heritable and moveable property*, 758; *natural character*, 760; *accessory character*, 761; *heirship moveables*, what, 763; *destination* may change character of subject, 764; *incorporeal subjects*, 765; simple personal debts and shares in companies are moveable, 766; arrears of the annual returns of debts and funds are moveable, 767; also price of lands sold, 768; except where by an apparent heir, *ib.*; rights having a tract of future time are heritable, 769; accession, 770; destination operates same as in corporeal subjects—adjudication and arrestment, what they will carry, 772.

*Succession in general*—a proprietor may dispose of his property by gratuitous deeds, 773; limitations to this power, *ib.*; when law of succession comes into opera-

*Succession—continued.*

tion, 774; distinction between law of succession in heritable and moveable property, 775; preference of males and primogeniture, *ib.*; the heir, 776; the executor, *ib.*; *hæreditas*, what, 777; representative regarded as same person as deceased, *ib.*; *opening of the succession*, 779; opens by natural or civil death, *ib.*; in an entail, may do so before death, *ib.*; *vesting*, 781; requisites that person must possess in order to, *ib.*

*Descent and consanguinity as applicable both to heritable and moveable succession*—consanguinity, 782—lineal descent, 783; lineal ascent, 784; collateral kindred, 785; full blood, 787; half blood consanguinean and uterine, 788, 789; no succession in heritage between these two classes, 790; different in moveables, *ib.*; how far relationship reckoned, 791.

*Of heritable succession*, 792.

(1.) *Of intestate heritable succession*, 792; primogeniture and preference of males, *ib.*; *heirs portioners*, 793; no difference between daughters of a first and subsequent marriage, 794; how children of a daughter succeed, 795; rights of eldest heir portioner, 796–8; *representation*, 799; *collateral succession*, 800; *ascending line*, 804; heritage never ascends to mother, 805; *ultimus hæres*, is the Crown, 806; burdens under which it takes estate, *ib.*; Crown has same rights to moveable property, 807; *conquest*, what, 808; exceptions to, 809; rules of succession in, where a middle brother or sister dies, 812; *heir apparent*, who, 813; *heir presumptive*, who, 814; becomes heir apparent after



*Succession—continued.*

succession has opened, *ib.*; apparent heir may enter into possession of lands, 815; his right to rents, 816; may bring estate to judicial sale for debt, 817; *annus deliberandi*, 818; now limited to six months, *ib.*

- (2.) *Of heritable succession by deed*—distinction between a disposition and a will, 819; words which must be used in conveying heritage, 820; fiction on which a deed of this nature proceeds, 821; conveyance in general terms effectual, 822; *substitutions*, 823; institute and substitute, *ib.*; *technical words*, 824; where used, received meaning of such will be adhered to, *ib.*; how deed will be construed when these not used, *ib.*; *heir*, what included in term, 825; *heir male*, 826; *heir of line*, 827; *heir male of line*, 828; *heir female*, 829; *heir male of the body*, 830; *heir whatsoever*, 831; opening of succession rules the time, 833; *simple destination*, 834; *clause of return*, what, 835; when not effectual, *ib.*; *power to name heirs*, 836; may be given, and if used effectual, *ib.*; *limited destination*, what it includes, 837; *fee and liferent*, 838; *conjunct fee and liferent*, 839; rules as to, 840-2; *substitutions with prohibitions to alter*, 843; not entails unless other conditions of Entail Acts complied with, *ib.*; simply personal contracts, *ib.*

*Entails*, 844.—See Entails.

*Conditional settlements*, 913; may be express or implied, *ib.*; implied conditions, 914; express conditions, 915.

*Law of deathbed*, 916; objects of, 917; the two tests of vigour, 918; extreme old age, if a ground of reduction, 919; how

*Succession—continued.*

sixty days computed, 920; when deed antedated, 921; leases, when reducible and when not, 922; onerous deeds not reducible, 923; who entitled to reduce, 924; reduction confined to heritage, 925; exceptions, *ib.*; mental alienation, 926.

*Entry of the heir*, 927; *entry by servica*, 929; old form of procedure, 930; procedure as now regulated by 10 and 11 Vict., c. 47, 931-42; *entry by writ of clare constat*, 943; precept of clare, 944; provisions of Titles to Land Act as to these, 945-6; *entry by adjudication on a trust bond*, 947; *entry to burgage property*, 948; now assimilated by Titles to Land Act, 1860, to lands not held burgage, *ib.*; provision of that statute as to, *ib.*; *charges*, abolished by 10 and 11 Vict., c. 48, 949; heir now allowed only six months for deliberation, 950.

SUCCESSION IN MOVEABLES—*intestate*, 951; distinction between heritable and moveable succession, *ib.*; representation now by issue of predeceasing next of kin, 952; no representation among collaterals after descendants of brothers and sisters, 953; rule, that collaterals succeed before ascendants, modified in favour of father and mother, 954; full blood takes precedence of half blood, 957; rule as to brothers and sisters uterine, 958; wife's representatives no right to any share of goods in communion, 960; no difference in rights though marriage be dissolved within year and day, 961; but this only applies to moveables, *ib.*; not to property made separate in the wife by deed, 962.

**Succession—continued.**

*Testate succession*—testament and will the same, 963; it must be the *last* will of deceased, 964; where several are left, last alone effectual, 965; who may make, 966; only a person who has neither wife nor child that can dispose of his whole moveable estate, 967; wife's share of goods becomes her absolute property, 969—*see* Husband and wife; *legitim* over this, deceased has no power of testing, 970; representation introduced by 18 Vict., c. 23, does not apply here, *ib.*; how claims to *legitim* may be excluded, 971; *dead's part*—this alone may be bequeathed, 972; ascertained wishes of deceased in regard to this portion will be carried into effect, 973; illegal to direct accumulation of property beyond certain periods, 974.

*Rules for making a will*, 975; verbal legacies only good to L.8, 6s.8d., 976; holograph wills valid without witnesses, 977; but must be proved to be so, *ib.*; if not holograph, witnesses required, 978; who cannot be witnesses, 979; enough if he acknowledges his signature, 980; names of witnesses and writer of deed must be mentioned, *ib.*; no objection that testator was blind, 981; his hand must not be led or letters traced, 982; must sign every page, 983; subscription by initials or mark, 984; reading of deed, 985; when testator cannot write, 986; *executor*, what, 987; his duties, 988; *legacy*, 989—*see* Legacy.

*Legacies*, 988 *et seq.*—*See* Legacy.

*Form of will*, 1001; *collation*, what, 1002; privilege extended to child of heir by 18 Vict., c. 23, 1003; must collate in order

**Succession—continued.**

to share, though heritage in another country, 1004; *confirmation*, 1005; if an executor named, he is entitled to be confirmed in preference to all others, 1006; order of choice by commissary when none appointed, 1008; executors not nominated must find security, 1009; executor-creditor, 1010; persons exempted from confirming, 1011; *order of payment of debts*, 1012; what debts privileged, *ib.*; six months must be allowed after death for ordinary creditors to come forward, 1013; executor's services gratuitous, 1014.

*Taxes payable on succession*, 1015.

*International law of succession*, 1019; provisions of 24 and 25 Vict., c. 114, *ib.*; rules as to moveable property of person dying abroad, 1020; as to heritage, 1021; provisions of 24 and 25 Vict., c. 121, as to acquiring domicile, 1022.

Sunday, contracts made on, good, 1067.

Superior and vassal, 1169.

Superintendents under poor law, 1942.

Supervision, Board of, 1888, 2131.

Support, servitude of, 1255.

Supreme Courts and Judges, 1945.

Suspension, caution in, 1731.

Synod, 2140.—*See* Courts, Ecclesiastical.

Tacit relocation, 1362.

Tacit renewal of contract of service, 682.

Tack or lease, 1309.—*See* Letting or Hiring.

Tailzie, 844.—*See* Entail.

Taxed ward, 1172.

Teind Court, 1996.—*See* Court.

Tenant, 1309 *et seq.*—*See* Letting and Hiring.

Terce, 173.—*See* Husband and Wife.

Term of entry for servants, 557.  
 Testament, 963 *et seq.*—*See* Succession.  
 Thirlage, 1259.  
 Tocher, 64, 65.—*See* Marriage.  
 Town, 2070.—*See* Burgh Court.  
 Trade secrets, 621.  
 Transference of bills of lading, 1149.  
 Transference of ships, 1159.  
 Translations, 1824.—*See* Copyright.  
 Transmission of lease, 1345.  
 Transitu, stoppage in, 1139.  
 Travellers, effects of, in inn, not liable for landlord's hypothec, 1389.  
 Trees in wood, 1332.  
 Treason, high, prescribes in three years, 1304.  
 Triennial prescription, 1298.—*See* Prescription.  
 Trout, tenant cannot fish for, in stream passing through his farm, 1342.  
**TRUSTS AND TRUSTEES**, 1023; *trusts in general, ib.*; features common to all trusts, 1024; *of the trustees*, 1028; no specific number requisite, *ib.*; only one in a sequestration, 1029; several usually named in family settlements, 1030; where several named jointly, 1031; quorum, 1032; *sine qua non*, 1033; common practice to declare acceptors or survivors trustees, 1034; when nomination defeated, court will appoint a factor, 1035; trustees cannot be compelled to accept, 1036; resignation, *ib.*; where court will exonerate trustee, 1037; when trust wound up, trustees may be discharged, 1038; application to court if beneficiaries refuse, *ib.*; trustees may be compelled to denude by action of declarator, *ib.*; trustees may be assumed on deathbed, 1039; if purposes of trust expressed, powers of trustees, 1040; power to name factor, 1041; responsibility for same, 1042; cannot supersede a factor named by truster, 1043;

where they appoint one of their own number, 1044; *responsibility of trustees*, 1045; as trustees and as individuals, 1046; an exempting clause will not protect from culpa, 1047; *power to resign*, 1048; clause empowering trustees to resign effectual, *ib.*; provisions of 24 and 25 Vict., c. 84, in regard to trusts, 1049.  
 Trustee in sequestration, 1457.—*See* Bankruptcy.  
 Turnpike road, 1209.—*See* Highway.  
 Tutor, 331.—*See* Guardianship.  
 Tutorial accounts, decennial prescription of, 1291.  
 Tutors and governesses, engagement of, 554.  
 Ultimus hæres, 806.  
 Underwriters, 1739.—*See* Insurance.  
 Union with England, its effects on law of Scotland, 3; office of Chancellor of Scotland abolished at, 1948; new Court of Exchequer established subsequent to, 1987—*see* Court of Exchequer; its provisions with reference to justices of the peace, 2077.  
 Union of parishes for purposes of Poor Law Act, 1895.  
 Universities, privileges of, perpetual copyright held by, 1818.  
 Universities, scholars of, when not licensed to beg, subject to penalties, 1883.  
 Urban servitude, 1254.  
 Urban subjects, letting of, 1369.  
 Usage of trade, effect of, in sale, 1097.  
 Uterine brothers and sisters, 789.  
 Vassal, feudal, 1168.  
 Verbal lease, 1310.  
 Verdict of jury, 1983.  
 Vergens ad inopiam, 1119.—*See* Sale.  
 Vermin, tenant may kill, 1340.  
 Vermin, tenant may throw up lease if house uninhabitable from, 1381.

- Vicennial prescription, 1288.  
 Vintner's responsibility, 1412.  
 Voyage, non-alteration and non-deviation of, 1757.—*See Insurance*.  
 Wadset, 1867.  
 Wagers, 1066; in insurance, 1741, 1770.  
 Wages, obligation to pay, 655; term of payment of, 662; lien for, 664, 1425; arrestment of, 665; prescription of, 666.—*See Master and Servant*.  
 Ward, 325.—*See Guardianship*.  
 Ward holding, 1172.  
 Warehousing of goods, 1428.  
 Warning, actions of removing prescribe in three years after, 1302.  
 Warning, judicial, in removing, 1362.  
 Warning in burghal tenements, 1382.  
 Warning in service, 682.  
 Warrandice in sale, 1130.  
 Warranties, express and implied, in marine insurance, 1750.  
 Warranty in fire insurance, 1776.  
 Warranty in life insurance, 1789.  
 Water, 1251; watering of cattle, 1253.  
 Way, 1242.—*See Servitude*.  
 Weights and measures, 1099.—*See Sale*.  
 Wharfingers, their liability, 1420.  
 Widow, her right to terce, 173.—*See Marriage*.  
 Widow, when entitled to relief under poor law statute, 1906.  
 Wife, 10.—*See Marriage*.  
 Will, 963.—*See Succession*.  
 Will, form of, 1001.  
 Winding up of a partnership, 1618.  
 Winding up of a joint-stock company, 1673.  
 Witnesses, regulations as to producing, in Small Debt Courts, 2065.—*See Evidence*.  
 Women and children, restrictions on the employment of, in factories, 705.  
 Wood and trees, 1332.  
 Workmen, statute law relating to, 689.  
 Writers or clerks to the signet, highest class of law agents, 2173; same as attorneys and solicitors in England, 2174; are conveyancers and managers of private affairs, *ib.*; practise before supreme courts, 2175; sign summonses and other writs that pass the signet, 2176; constitution of society, *ib.*; admission to, 2178; fees of, 2182.  
 Writers in provincial towns, 2189; their functions, *ib.*; in Aberdeen are called advocates, *ib.*—*See Notaries*, 2191.  
 Wrongous imprisonment, actions of, prescribe in three years, 1303.  
 Year and day, effect of dissolution of marriage within, abolished, 171.  
 Younger children, provisions to, 851, 876.—*See Entail*.

THE END.







